Supreme Court, U.S.
FILED
05-271 AUG 25 2005
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DEBRA F.

Petitioner,

vs.

STATE OF WISCONSIN

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Wisconsin

PETITION FOR WRIT OF CERTIORARI

MICHAEL J. GONRING
Counsel of Record
NATALIE C. GIUGNO
JOSEPH O. WILSON
Counsel for Petitioner
QUARLES & BRADY LLP
411 EAST WISCONSIN AVENUE
MILWAUKEE, WI 53202-4497
(414) 277-5000

QUESTION PRESENTED FOR REVIEW

1. DO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND FUNDAMENTAL TENETS OF STATUTORY CONSTRUCTION REQUIRE THE STATE TO PROVE BEYOND A REASONABLE DOUBT THAT "ACTIVE EFFORTS HAVE BEEN MADE TO . . . PREVENT THE BREAKUP OF THE INDIAN FAMILY" IN ACCORDANCE WITH § 1912(D) OF THE INDIAN CHILD WELFARE ACT, 25 U.S.C. §§ 1901 ET SEQ., IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS INVOLVING INDIAN CHILDREN?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Debra F., a mother whose parental rights were terminated as to her son, Branden F., by the State of Wisconsin, respectfully moves this Honorable Court to issue a Writ of Certiorari to review the unpublished opinion of the Wisconsin Court of Appeals entered on March 22, 2005, and the Wisconsin Supreme Court Order entered on June 1, 2005, denying Debra F.'s Petition for Review.

OPINIONS BELOW

The opinion of the Wisconsin Court of Appeals affirming the trial court's termination of Debra F.'s parental rights as to her son, Branden F., is unofficially reported at 2005 WI App 88, 695 N.W.2d 905, and appears in Petitioner's Appendix at A-1 to A-16. The Order of the

Wisconsin Supreme Court denying Debra F.'s Petition for Review appears in Petitioner's Appendix at B-1 to B-2.

STATEMENT OF THE BASIS FOR JURISDICTION

1. The opinion of the Wisconsin Court of Appeals sought to be reviewed was rendered on March 22, 2005.

2. Petitioner's timely Petition for Review to the Wisconsin Supreme Court was denied on June 1, 2005.

3. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a) and Rules 10(b) and (c) of the Supreme Court of the United States. The Wisconsin Court of Appeals' decision to affirm the trial court's adoption of the burden of clear and convincing evidence under § 1912(d) of the Indian Child Welfare Act is inconsistent with decisions of other state courts of last resort, and is in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition concerns the required burden of proof under § 1912(d) of the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., and the Due Process Clause of the Fourteenth Amendment.

U.S. Const. amend. XIV, § 1

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1257

State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

25 U.S.C. § 1901

Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal Responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article 1 of the United States Constitution provides that "The Congress shall have Power *** To regulate Commerce *** with Indian tribes [footnote omitted]" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1902

Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1912

. . .

(d) Remedial services and rehabilitative programs; preventative measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damages to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the

parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damages to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

INTRODUCTION

Section 1912(d) of the Indian Child Welfare Act of 1978 ("the ICWA"), 25 U.S.C. § 1901 et seq., requires the State to prove that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." The section is silent as to the State's burden of proof. This silence leads to the question which is at the heart of this Petition: Do the protections afforded by the Due Process Clause as well as fundamental principles of statutory interpretation require the State to prove beyond a reasonable doubt that it has made "active efforts . . . to prevent the breakup of the Indian family" in termination of parental rights ("TPR") cases? The Petitioner, Debra F. ("Debra"), respectfully submits that the Due Process Clause and rules of statutory interpretation require just such a showing.

In this case, the Wisconsin Court of Appeals ignored a fundamental tenet of statutory interpretation – subsections of statutes must be read in the context of both the entire section and the statute as a whole. When read in context, keeping in mind the ICWA's stated purposes and Congressional findings on the importance of preserving Indian culture, due process requires the State to prove beyond a reasonable doubt that "active efforts have been made to . . . prevent the breakup of the Indian family" in TPR cases involving Indian children.

STATEMENT OF THE CASE

The issue before the Court is precise: Should the State have to prove beyond a reasonable doubt that "active efforts have been made to . . . prevent the breakup of the Indian

family" in TPR cases? The issue is purely legal in nature, and the facts surrounding Debra's parenting are not relevant. Given the history of governmental treatment of Indians, clearly stated public policy underlying the ICWA, and the fact that nothing is more fundamental than the right to parent one's child, there is only one answer: The burden of proof should be beyond a reasonable doubt. Debra respectfully requests that the Court grant this Petition to provide future guidance to fact-finders in TPR cases invoking the ICWA.

This is an appeal from the Supreme Court of Wisconsin's refusal to review the Wisconsin Court of Appeals' decision, which affirmed the judgment and order entered by the Circuit Court for Milwaukee County, Children's Division, on June 24, 2004. The circuit court judgment terminated Debra's parental rights as to her son, Branden F. ("Branden").

Branden was found to be a child in need of protection or services on September 15, 1999. *In re Branden F.*, 2005 WI App 88, ¶ 3, 695 N.W.2d 905 (unpublished opinion). On June 25, 2002, the State filed a petition seeking to terminate Debra's parental rights on the grounds that Debra had failed to assume parental responsibility. *Id.* at ¶ 4.

On July 24, 2004, the White Earth Band of the Minnesota Chippewa Tribe (the "Tribe") notified the court that Branden was eligible for enrollment as a tribal member, thus invoking the protections offered by the ICWA. *Id.*

The first trial in this matter ended in a mistrial. *Id.* at ¶ 6. During the second trial, the court heard oral argument regarding the proper burden of proof for "active efforts" for the purposes of the jury instructions and special verdict questions. Debra argued that the burden should be beyond a

reasonable doubt, but the court agreed with the State and held that it need only prove "active efforts" by clear and convincing evidence. (*See* P-App. at C-1 to C-12.)

The final version of the jury instruction read:

> The burden of proof as to Questions 1, 2, and 3 of the Special Verdict is upon the Petitioner to convince you to a reasonable certainty by evidence that is clear, satisfactory and convincing that the question should be answered "yes." If you are not so satisfied, you must answer that particular question "no."
>
> Clear, satisfactory, and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. If you have to guess what the answer should be after discussing all evidence which relates to a particular question, then the party having the burden of proof as to that question has not met the required burden. . ..

(R.51; *see* P-App. at D-1 to D-2.)

The special verdict form read, in relevant part:

> QUESTION 2: From July 11, 2002, through today's date, has the Bureau of Milwaukee Child Welfare made active efforts to provide remedial services and rehabilitative

programs designed to assist Debra F[.] in regaining custody of Branden F[.]?

If you answered Question 2 "Yes," answer Question 3.

QUESTION 3: Have the efforts referred to in Question 2 proven unsuccessful?

(R.52; *see* P-App. at E-1 to E-2.)

On May 21, 2004, the jury answered these questions in the affirmative. *In re Branden F.*, 2005 WI App 88, ¶ 6, 695 N.W.2d 905; *see* P-App. at E-1 to E-2. At the dispositional hearing on June 24, 2004, the trial court found that the State had satisfied the requirements of Wisconsin law and the ICWA, and it terminated Debra's parental rights. *Id.* at ¶ 7.

Debra appealed the burden of proof issue to the Wisconsin Court of Appeals and requested that it reverse the trial court's judgment and order a new trial. She argued that the trial court had erred when it relied on *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982), in support of its adoption of the clear and convincing evidence standard:

> Next, the trial court cited Santosky to support its adoption of the clear and convincing evidence standard. Notably, Santosky, although a TPR case, was not an ICWA case. In that case, the Court held that due process required a minimum standard of proof of clear and convincing evidence in TPR proceedings, because (1) the private interests affected by the proceedings are

> "commanding"; (2) the risk of error created by the State's chosen procedure is "substantial"; and (3) the countervailing government interest in supporting the use of the challenged procedures is "comparatively slight."
>
> . . .
>
> Santosky commands that all TPR proceedings require a burden of proof of at least clear and convincing evidence. But ICWA creates additional protections for the parent and requires a higher burden of proof in TPR proceedings.
>
> . . .
>
> Moreover, ICWA was created as a response to the extreme cultural bias against American Indians. As explicitly recognized by ICWA, there is an even greater risk for cultural bias in ICWA proceedings against Indian parents than in normal TPR proceedings, further supporting the need for a higher burden of proof.

(*See* P-App. at F-1 to F-5) (footnotes omitted).

Debra reiterated her due process argument in her Reply Brief to the court of appeals:

> When applied correctly, ICWA provides additional protections to parents like Debra. Here, the trial court stripped § 1912(d) of its protections. Contrary to the State's

> incredible assertion, Debra's Due Process protection was certainly not enhanced when the trial court submitted § 1912(d) to the jury with a lesser burden of proof.

(*See* P-App. at G-1 to G-2) (footnote omitted).

The court of appeals denied Debra's appeal and affirmed the trial court's judgment. *Id.* at ¶ 1. The court of appeals found that the trial court did not err in requiring the State to prove the active efforts requirement by clear and convincing evidence. *Id.* at ¶ 19.

On April 21, 2005, Debra petitioned the Supreme Court of Wisconsin to review the court of appeals' decision. She again argued that her due process rights were violated when the court of appeals affirmed the trial court's ruling:

> The lower courts also misconstrued the holding in Santosky, finding that it supported the decision that § 1912(d) need only be proved by clear and convincing evidence. Yet Santosky was not a TPR case where the ICWA applied. Rather, the United States Supreme Court held that due process requires states to support their allegations under state law in TPR cases by *at least* clear and convincing evidence. It was *not* a TPR case that invoked the ICWA.
>
> The ICWA was enacted to provide *additional* protections for the parent, and it requires a higher burden of proof in TPR proceedings. The ICWA was created as a response to the extreme cultural bias against

> American Indians. As explicitly recognized by the ICWA, there is an even *greater* risk for cultural bias in TPR proceedings against Indian parents than against non-Indian parents, further supporting the need for a higher burden of proof.

(*See* P-App. at H-1 to H-3) (footnotes omitted).

The Supreme Court of Wisconsin denied Debra's Petition for Review on June 1, 2005. (*See* P-App. at B-1 to B-2.)

Debra now petitions this Court and respectfully requests that it grant a Writ of Certiorari to review the Wisconsin Court of Appeals' decision affirming the trial court's adoption of the clear and convincing evidence burden of proof for the "active efforts" requirement under § 1912(d), and its judgment terminating her parental rights as to Branden.

REASONS FOR GRANTING THE PETITION

I. DUE PROCESS REQUIRES THAT THE STATE PROVE BEYOND A REASONABLE DOUBT THAT IT MADE ACTIVE EFFORTS TO PREVENT THE BREAKUP OF THE INDIAN FAMILY.

A. Public Policy Calls for a Higher Burden of Proof in TPR Cases That Involve Indian Children.

The Indian Child Welfare Act was enacted in 1978 "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. It was a response to the

"alarmingly high percentage" of Indian families that were destroyed by having their children placed in non-Indian foster and adoptive homes. *Id.* § 1901(4). Congress specifically found that states "have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." *Id.* § 1901(5).

The ICWA was created as a response to the extreme cultural bias against American Indians. *See* 25 U.S.C. § 1901(4)-(5). As explicitly recognized by the ICWA, there is an even *greater* risk for cultural bias in TPR proceedings against Indian parents than in TPR proceedings that do not involve Indian parents, further supporting the need for a higher burden of proof. *Id.* § 1901(5).

Pursuant to the goal of protecting Indian culture and heritage, the Bureau of Indian Affairs expressed its clear preference for keeping Indian families intact by deferring to tribal judgment on matters concerning the custody of Indian children.[1] Any state court reaching a result contrary to these

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[1] Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings A.1., 44 Fed. Reg. 67,584 (Nov. 26, 1979) ("BIA Guidelines") (attached hereto as P-App. at I-1 to I-29). While not binding, these guidelines have been accepted as persuasive authority by this Court, as they are a strong indication of the spirit and purpose of the ICWA. *See, e.g., Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 51-53, 109 S. Ct. 1597, 1610, 104 L. Ed. 2d 29 (1989); *see also, In the Matter of S.M.H.*, 33 Kan. App. 2d 424, 433, 103 P.2d 976, 983 (2005); *In re the Matter of A.G.*, 326 Mont. 403, 407, 109 P.3d 756, 759 (2005); *In the Interest of Brittany C.*, 13 Neb. App. 411, 422, 693 N.W.2d 592, 602 (2005); *Fresno County Dep't of Children & Family Servs. v. Superior Court*, 122 Cal. App. 4th 626, 642, 19 Cal. Rptr. 3d 155, 165 (2004); *In the Interest of D.M., et al.*, 2004 SD 90, ¶ 10, 685 N.W.2d 768, 770-71; *In re D.S.P.*, 166 Wis. 2d 464, 476-77, 480 N.W.2d 234, 239-40 (1992); *In the Matter of M.S.S.*, 465 N.W.2d 412, 418-19 (Minn. Ct. App.

preferences must follow strict procedures and meet the stringent requirements of the ICWA. (*See* BIA Guidelines A.1; P-App. at I-10 to I-11.)

Furthermore, and significantly in this case, because the ICWA is a remedial statute, any ambiguities in the ICWA must be resolved "in favor of the result that is most consistent with th[e] preferences" of the ICWA, the federal regulations implementing the ICWA, the BIA Guidelines and any state statutes, regulations or rules promulgated to implement the ICWA. *Id.*

B. Due Process Requires the State to Prove "Active Efforts" by Proof Beyond a Reasonable Doubt.

In *Santosky* this Court acknowledged and emphasized the importance of fundamentally fair procedures in TPR cases, in which parents face a judgment forever terminating their parental rights.

> The fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their

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1991).

> family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Id. at 753-54, 102 S. Ct. at 1394-95.

The court also recognized that due process demands that the parent know the standard of proof prior to a hearing:

> Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance. Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard.

Id. at 757, 102 S. Ct. at 1397.

With those principles in mind, the Court applied the three-part test that was first enunciated in *Matthews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), holding that due process requires that the state support its allegations in TPR cases that do not implicate the

ICWA by *at least* clear and convincing evidence. *Santosky*, 455 U.S. at 748, 102 S. Ct. at 1391-92. In so holding, the Court invalidated the "fair preponderance of the evidence" standard found in the New York Family Court Act for TPR cases, as it denied parents due process. *Id.* at 748, 102 S. Ct. at 1391-92.

Matthews requires the Court to balance (1) the private interests affected by the proceeding, (2) the risk of error created by the State's chosen procedure, and (3) the countervailing governmental interest supporting use of the challenged procedure. 424 U.S. at 335, 96 S. Ct. at 903, 47 L. Ed. 2d 18.

Applying the first factor to TPR cases, the Court found in *Santosky* that the effect on parents' private interests in parenting their child is "commanding." 455 U.S. at 758, 102 S. Ct. at 1397. "A natural parent's 'desire for and right to 'the companionship, care, custody, and management of his or her children' is an interest far more precious than any property right.'" *Id.* at 758-59, 102 S. Ct. at 1397 (citations omitted). In seeking to terminate a parent's rights, the state wants to not only "infringe that fundamental liberty interest, but to end it." *Id.* at 759, 102 S. Ct. at 1397. "Few forms of state action are both so severe and so irreversible." *Id.*, 102 S. Ct. at 1398.

Turning to the second factor, the Court found that the risk of erroneous factfinding was high. *Id.* at 762, 102 S. Ct. at 1399. The Court found that during TPR proceedings, "numerous factors combine to magnify the risk of erroneous factfinding." *Id.* Such proceedings "employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge." *Id.* The judge must evaluate "the nature and quality of a complex series of

encounters among the agency, the parents, and the child," and it therefore "possesses unusual discretion to underweigh probative facts that might favor the parent." *Id.* The Court also noted that "because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias." *Id.* at 763, 102 S. Ct. at 1399-1400.

Lastly, the Court found that the countervailing governmental interest favoring a lower standard of proof was comparatively slight. *Id.* at 758, 102 S. Ct. at 1397. "A stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State . . . . Nor would an elevated standard of proof create any real administrative burdens for the State's factfinders." *Id.* at 767, 102 S. Ct. at 1402.

The unique issues present in cases involving Indian children call for even greater due process protections than those set forth for TPR cases that do not implicate the ICWA. First, the private interests of Indian parents in raising their children are equally "commanding" and arguably, according to Congressional findings, carry even more weight if the fact finder considers the societal interest in maintaining Indian culture by preserving its families. Second, although *Santosky* was not an ICWA case, this Court recognized the risk of bias inherent in all TPR proceedings. Congress clearly found that this risk is even greater in TPR cases involving Indian parents. *See* 25 U.S.C. § 1901(4). Finally, the State can articulate no greater interest in being held to a low burden of proof than it could in *Santosky*. Thus, it is evident that under the three-part test set forth in that case, there is a need for a higher burden of proof requirement in ICWA cases to ensure that Indian parents receive due process.

The Court has already noted in *Santosky* that termination of an Indian parent's rights under the ICWA requires the highest standard of proof, stating, "The only analogous federal statute of which we are aware permits termination of parental rights solely upon 'evidence beyond a reasonable doubt.'" *Id.* at 749-50, 102 S. Ct. at 1393 (*citing* § 1912(f)). Notably, this Court did not indicate that some elements need to be proved beyond a reasonable doubt while others could be proved by a lesser burden. Although this language was dicta, this Court did take notice of the additional protections Indian parents are afforded by the ICWA, and Debra respectfully requests this Court to accept this Petition and squarely address this issue.

This Court has not addressed this important question of federal law. This case presents the Court with an opportunity to provide guidance to future fact-finders in TPR cases implicating the ICWA. Debra respectfully submits that due process requires States to prove beyond a reasonable doubt that they have made "active efforts" to prevent the breakup of the Indian family in TPR cases which involve Indian children.

II. THE WISCONSIN COURTS' ADOPTION OF THE BURDEN OF PROOF OF CLEAR AND CONVINCING EVIDENCE FOR § 1912(D) IS IN CONFLICT WITH OTHER STATE COURTS' DECISIONS AND WARRANTS REVIEW UNDER SUPREME COURT RULE 10(B).

An intermediate appellate court may function as a "court of last resort" for the purposes of Supreme Court Rule 10 when the state supreme court denies review, including discretionary review. *See Perry v. Thomas*, 482 U.S. 483, 489 & n.7, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987);

California v. Trombetta, 467 U.S. 479, 484, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 n.1, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968).

The Supreme Court of Wisconsin denied Debra's Petition for review (*see* P-App. at B-1 to B-2), and therefore, the Wisconsin Court of Appeals was the effective "court of last resort" for this Petitioner.

Jurisdictions are split over whether the State must prove "active efforts" by clear and convincing evidence or beyond a reasonable doubt.[2] Debra respectfully requests that the Court grant this Petition and decide this issue to ensure uniform application of the ICWA among state courts.

A. Fundamental Tenets of Statutory Construction Require the Higher Burden of Proof.

The court of appeals ignored the long-standing rule of statutory construction that directs courts to "look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *See, e.g., McCarthy v. Bronson*, 500 U.S. 136, 139, 111 S. Ct. 1737, 1740, 114 L. Ed. 2d 194 (1991); *Crandon v. United States*, 494 U.S. 152, 158, 110 S. Ct. 997, 1001, 108 L. E. 2d 132 (1990); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 1818, 100 L. Ed. 2d 313 (1988); *Erlenbaugh v. United States*, 409 U.S. 239, 244, 93 S. Ct. 477, 480 34 L. Ed. 2d 446 (1972). Courts must "read the language of a specific statutory section in the context of the entire statute,"

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[2] *See In the Matter of G.S. & S.S.*, 2002 MT 245, ¶ 31, 312 Mont. 108, 119, 59 P.3d 1063, 1071 (lists cases reflecting split among courts).

interpreting it "in light of its textually manifest scope, context and purpose." *Bosco v. Labor & Indus. Review Comm'n*, 2004 WI 77 at ¶ 23, 272 Wis. 2d 586, 604, 681 N.W.2d 157, 166.

The larger context of § 1912 supports the requirement that "active efforts" be proved beyond a reasonable doubt:

> . . .
>
> (e) Foster care placement orders; evidence; determination of damage to child
>
> No foster care placement may be ordered in such proceeding in the absence of a determination, supported by *clear and convincing evidence*, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
>
> (f) Parental rights termination orders; evidence; determination of damage to child
>
> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence *beyond a reasonable doubt*, including testimony of qualified expert

> witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(e)-(f) (emphasis added).

As several other courts have concluded, it is logical that the burden of proof required to prove "active efforts" depends on the nature of the proceeding – in a foster care placement proceeding, "active efforts" must be proved by clear and convincing evidence, but in a termination of parental rights proceeding, "active efforts" must be proved beyond a reasonable doubt.[3]

> Logically, this seems to be compelled: If termination of parental rights of Indian parents to their children can be ordered only upon a factual basis shown beyond a reasonable doubt (§ 1912(f)), and if termination cannot be effected without a showing of active efforts to prevent the breakup of the Indian family and a failure thereof (§

[3] *See, e.g. In the Matter of G.S. & S.S.*, 2002 MT 245, ¶ 33, 312 Mont. 108, 120, 59 P.3d 1063, 1071; *In the Interest of S.R.*, 323 N.W.2d 885, 887 (S.D. 1992); *In the Matter of M.S.S.*, 465 N.W.2d 412, 418 (Minn. Ct. App. 1991); *In re L.N.W.*, 457 N.W.2d 17, 19 (Iowa Ct. App. 1990); *In the Matter of Kreft*, 148 Mich. App. 682, 693, 384 N.W.2d 843, 849 (1986); *In re Morgan*, 140 Mich. App. 594, 604, 364 N.W.2d 754, 758 (1985).

> 1912(d)), then the adequacy of efforts and futility of them, as predicates to termination, must likewise be established beyond a reasonable doubt. Therefore, we recognize the reasonable doubt standard as appropriate in determining whether the petitioning party has complied with section 1912(d).

In the Matter of M.S.S., 465 N.W.2d 412, 418 (Minn. Ct. App. 1991).

B. Courts that Adopted the Lower Burden of Proof, Including the Wisconsin Court of Appeals, Ignored Fundamental Principles of Statutory Interpretation.

Like the court of appeals and trial court in this case, courts in other jurisdictions that have adopted the clear and convincing evidence standard[4] have focused on the absence of a specified burden of proof in the text of § 1912(d). The courts state that § 1912(e) and (f) specifically refer to the requisite burdens of proof, and if Congress had meant for "active efforts" to be proved beyond a reasonable doubt, it easily could have said so.[5] 2005 WI App 88 at ¶ 20.

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[4] *See, e.g., In the Interest of M.S.*, 624 N.W.2d 678 (N.D. 2001); *In re Michael G.*, 63 Cal. App. 4th 700, 74 Cal. Rptr. 2d 642 (1998).

[5] Adopting that same reasoning, it follows that if Congress had intended the "active efforts" requirement to be proved by clear and convincing evidence, it could have specified that burden as well.

Again, the ICWA was enacted to provide *additional* protections for Indian parents, and any ambiguity should be resolved in favor of affording more protection to those parents, not less. 25 U.S.C. §§ 1901, 1902, 1912(f). As explicitly recognized by Congress, there is an even *greater* risk for cultural bias in TPR proceedings against Indian parents than against non-Indian parents, further supporting the need for a higher burden of proof. 25 U.S.C. §§ 1901-1902.

CONCLUSION

This Petition presents a very important question of federal law – one implicating due process rights of parents in cases where the State seeks to take away the fundamental right to parent an Indian child. Courts of last resort throughout the country are adopting different burdens of proof for § 1912(d). Courts that have adopted the clear and convincing evidence standard have ignored both long-standing principles of statutory interpretation and overwhelming evidence of a history of bias against Indian parents.

Wherefore, based upon all of the foregoing reasons, Petitioner respectfully asks the Court to grant *certiorari* review.

Respectfully submitted this 23rd day of August, 2005.

MICHAEL J. GONRING
Counsel of Record
NATALIE C. GIUGNO
JOSEPH O. WILSON
Counsel for Petitioner

QUARLES & BRADY LLP
411 East Wisconsin Avenue
Suite 2040
Milwaukee, WI 53202-4497
Attorneys for Petitioner
Debra F.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DEBRA F.

Petitioner,

vs.

STATE OF WISCONSIN

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Wisconsin

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

MICHAEL J. GONRING
Counsel of Record
NATALIE C. GIUGNO
JOSEPH O. WILSON
Counsel for Petitioner
QUARLES & BRADY LLP
411 EAST WISCONSIN AVENUE
MILWAUKEE, WI 53202-4497
(414) 277-5000

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COURT OF APPEALS DECISION
DATED AND FILED MARCH 22, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-2560 **Cir. Ct. No. 02TP000437**

STATE OF WISCONSIN
IN COURT OF APPEALS
DISTRICT I

IN RE THE TERMINATION OF PARENTAL RIGHTS TO BRADEN F., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

DEBRA F.,

RESPONDENT-APPELLANT.

APPEAL from order of the circuit court for Milwaukee County: JOSEPH R. WALL, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Debra F. appeals from an order terminating her parental rights to her son, Branden F., born October 20, 1998. She also appeals from an order denying her postdisposition motion. Debra claims: (1) the trial court erred

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

when it denied the motion to transfer this termination case to the tribal court; (2) the trial court erred when it modified language from the Indian Child Welfare Act ("ICWA") in formulating jury instructions and the special verdict questions; and (3) her trial counsel provided ineffective assistance. Because each issue is resolved in favor of upholding the orders, this court affirms.

BACKGROUND

¶2 When Branden was born on October 20, 1998, there was cocaine in his bloodstream. Debra signed a voluntary agreement, placing Branden into foster care, where he remains to this day. Since December 20, 1998, Branden has lived in the home of Sharon and Mark Traner as a foster child.

¶3 Approximately six weeks after Branden was born, Debra was in an altercation with one of her adult sons, was charged criminally, and spent sixteen months in prison. During that time, she participated in alcohol and drug abuse counseling, anger management, and parenting classes. She was released in August of 2000. On September 15, 1999, Branden was found to be a child in need of protection or services and continued placement in the Traner home was approved by the Bureau of Milwaukee Child Welfare (Bureau). This order was extended annually.

¶4 On June 25, 2002, the State filed a petition seeking to terminate Debra's parental rights on the grounds that Debra had failed to assume parental responsibility pursuant to WIS. STAT § 48.415(6) (2001-02). In July 2002, the White Earth Band of Minnesota Chippewa Tribe determined that Branden was eligible for enrollment in the tribe, thus triggering application of the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901, et. seq. On August 19, 2002, the tribe

filed a motion to intervene in the TPR proceedings. The trial court granted the tribe's motion in October 2002.

¶5 On April 3, 2003, the tribe filed a motion to transfer jurisdiction of the TPR case to the tribal court, pursuant to 25 U.S.C. § 1911(b). The State and the *guardian ad litem* opposed the motion. On June 16, 2003, the trial court denied the motion based on the untimeliness of the tribe's motion and the best interests of Branden.

¶6 The first trial in this matter resulted in a mistrial. The second trial occurred in May 2004. At the conclusion of the trial, the jury answered each of the following special verdict questions affirmatively:

> QUESTION 1: Has Debra [F.] failed to assume parental responsibility for Branden [F.]?
>
> QUESTION 2: From July 11, 2002, through today's date, has the Bureau of Milwaukee Child Welfare made active efforts to provide remedial services and rehabilitative programs designed to assist Debra [F.] in regaining custody of Branden [F.]?
>
> QUESTION 3: Have the efforts referred to in Question 2 proved unsuccessful?
>
> QUESTION 4: Is it likely that Branden [F.] will suffer serious physical or emotional harm if, upon conclusion of this trial, he is removed from his current foster home placement, placed with Debra [F.] and continued in her custody?

¶7 At the June 24, 2004 dispositional hearing, the trial court found that it was in Branden's best interests to terminate Debra's parental rights. An order to that effect was entered. Debra filed a postdisposition motion seeking a new trial based on ineffective assistance of counsel. The trial court denied the motion. Debra now appeals.

DISCUSSION

A. Transfer of Jurisdiction.

¶8 Debra argues that the trial court erred in denying the tribe's motion to transfer jurisdiction of this case to the tribal court. The State responds that the trial court's decision to retain jurisdiction was correct. This court agrees with the State.

¶9 The question of whether the trial court erred in denying the tribe's motion requesting transfer of jurisdiction requires statutory interpretation of the ICWA, which is a question of law reviewed independently. ***See in re Shawnda G.***, 2001 WI App 194, ¶6, 247 Wis. 2d 158, 634 N.W.2d 140. The pertinent portion of the ICWA requires the trial court to transfer the proceeding to the jurisdiction of the tribe unless good cause exists. *See* 25 U.S.C. § 1911(b); ***see also Shawnda G.***, 247 Wis. 2d 158, ¶6. Although this particular provision does not define good cause, the Bureau of Indian Affairs guidelines offer guidance. Specifically, the guidelines state that good cause exists to deny the transfer when "[t]he proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing." 44 Fed. Reg. 67, 584-91 (1979); BIA Guidelines C.3(b)(i).

¶10 Here, Debra argues that the case was not at an advanced stage because the motion to transfer was filed eight months before the trial date. The State and the *guardian ad litem* respond that the trial date is not the dispositive

factor in addressing the timeliness of the motion. Branden has never lived with Debra because he was placed in foster care immediately after he was born as a result of cocaine in his bloodstream. The Bureau contacted the tribe in November 1998 to inquire about any tribal affiliation. The tribe responded with two separate letters declaring that Branden was not eligible for tribal membership. The tribe did not take any action when Branden was found to be a child in need of protection or services. The tribe made no efforts with respect to Branden or the need to protect his Indian heritage until after the TPR was filed. It was not until July 2002 that the tribe decided Branden was eligible for membership. By that point in time, Branden had lived with his foster parents for almost four years.

¶11 The trial court viewed this case as a continuum and recognized these facts. The tribe initially denied any affiliation or interest in Branden, let four years go by, and did not act until the TPR and permanency planning for Branden occurred. A California court, facing a similar issue, held that good cause to deny a tribe's motion to transfer exists when a tribe fails to intervene until after the court has engaged in permanency planning for the child. ***In re Robert T.***, *246* Cal. Rptr. *168, 173* (Cal. Ct. *App. 1988).* In ***Robert T.***, the tribe did not file a motion to transfer jurisdiction until a TPR petition was filed, over sixteen months after the child was first detained. **Id.** at 172. The court found that a tribe's motion to transfer should be filed *before* a child's permanency plan becomes TPR and adoption, because the child forms a bond with the pre-adoptive placement, and breaking that bond will harm the child. **Id.** at 173.

¶12 In the instant case, like in *Robert T.*, the tribe waited until after the TPR petition was filed to request a transfer of jurisdiction. The delay here was even longer than in the ***Robert T.*** case-almost four years.

Moreover, the tribe declined the invitation to become involved in this case when Branden was only a few months old. If the tribe had acted a that time, Branden could have been placed with an Indian family or other relatives. The tribe declined the invitation to become involved at that point in time.[2]

¶13 Under these circumstances, this court concludes that the trial court's decision to deny transfer of jurisdiction was not erroneous. The excessive delay of the tribe to request a transfer constitutes good cause for the trial court's decision.

¶14 This court also concludes that the trial court did not err in considering Branden's best interests as it related to the request to transfer jurisdiction. The timeliness requirements referred to in the ICWA reflect a concern for the best interests of Indian children. The trial court's consideration of Branden's best interests was considered as a factor relating to the untimeliness of the tribe's attempt to take jurisdiction of his case. Branden had spent four years in a period of uncertainty as to his future. At the time the tribe intervened, Branden was close to obtaining permanency in his life and adoption by the foster parents who had raised him since infancy. To remove him at that point and transfer his case to tribal court would have created

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[2]Debra argues that this court should not rely on ***In re Robert T.***, 246 Cal. Rptr. 168 (Cal. Ct. App. 1988) because the ***Robert T.*** "court ignored the requirements of ICWA, which is designed to 'promote the stability and security of Indian tribes and families' through deference to 'the essential tribal relations of Indian people and the culture and social standards prevailing in Indian communities and families.'" (Citations omitted.) We disagree with Debra's assessment of the ***Robert T.*** case. The court in ***Robert T*** was faced with facts similar to the trial court in the instant case-whether an Indian tribe's substantial delay in requesting a transfer of jurisdiction constitutes "good cause" to deny transfer of jurisdiction. Thus, this court is not persuaded by Debra's claim that ***Robert T.*** offer "faulty reasoning."

more uncertainty, and undoubtedly additional delay in a permanency plan for Branden. Thus, the "best interests" consideration was tied to the timing of the motion to transfer.[3]

B. Jury Instructions/Verdict Language.

¶15 Debra next complains that the trial court erred when it modified language from the ICWA for the jury instructions and verdict used in this case. First, Debra contends that the trial court erred when it modified the "active efforts" language from the ICWA for the jury instruction. Specifically, the ICWA requires the State to "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs *designed to prevent the breakup of the Indian family* and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d) (emphasis added). The trial court modified the emphasized language so the jury was instructed as to whether the State proved that "the Bureau of Milwaukee Child Welfare has made active efforts to provide remedial services and rehabilitative programs designed to ... assist Debra [] *in regaining custody of Branden ....*" (Emphasis added.) This

---

[3] Debra spends a significant portion of her reply brief rebutting the State's argument that the ICWA should not apply to children who "have never been a member of an Indian home or culture." The trial court reflected this argument, and instead related that the ICWA did apply to this case despite the fact that Branden has never lived with Debra or with the tribe. As evidenced by the dispute over the modification of the language of ICWA for the jury instructions and special verdict, this was no doubt a difficult case. The facts and circumstances presented here were unique because Branden was not declared to be an Indian child immediately upon birth. The trial court, nevertheless, made significant efforts to ensure that the protections offered under the ICWA were followed in this case. This court concludes that the trial court did not err in rejecting the State's request to except this matter from the ICWA. This court declines to address the broader issue as to whether Wisconsin should adopt the "existing Indian family" doctrine in every case.

court concludes that the trial court's modification of the language did not constitute an erroneous exercise of discretion.

¶16 A trial court has wide discretion in issuing jury instructions based on the facts and circumstances of the case. ***State v. Vick,*** 104 Wis. 2d 678, 690, 312 N.W.2d 489 (1981). The discretion applies to both choice of language and emphasis. ***Id.*** at 690-91. This court will not find an erroneous exercise of discretion if the overall meaning communicated by the instructions was a correct statement of the law. ***Fisher v. Ganja,*** 168 Wis. 2d 834, 849, 485 N.W.2d 10 (1992).

¶17 In the factual context of this case, the phrases "prevent the breakup of the Indian family" and "assist Debra in regaining custody of Br[illegible]en" mean essentially the same thing. If the active services provided by the Bureau resulted in Debra regaining custody, the breakup of the Indian family is prevented. The concern the trial court had in using the former phrase, was that the jury would be confused because Branden had never resided in Debra's home. Branden was placed in foster care immediately after birth. Debra had not established the familial relationship with Branden. The trial court's decision was reasonable and did not alter the meaning of the language.

¶18 Debra's second contention is that the trial court erred in instructing the jury that the "active efforts" requirement needed to be proven by clear and convincing evidence. Debra argues that the court should have required proof beyond a reasonable doubt.

¶19 The portion of the ICWA at issue here provides that the State "shall *satisfy the court* that active efforts have been made ...." 25 U.S.C. §1912(d) (emphasis added). There is no specific burden of proof listed. In fact, the plain language of the statute seems to suggest that this a threshold issue to be decided by the court, rather than submitted to the jury.

Nevertheless, the trial court here submitted the issue to the jury. The trial court determined that, based on ***Santosky v. Kramer,*** 455 U.S. 745 (1982), the State must prove allegations to support a TPR petition by at least the clear and convincing standard. ***Id.*** at 747-48.[4]

¶20 The trial court then needed to determine whether the clear and convincing standard applied or whether the higher burden of beyond a reasonable doubt applied. After reviewing the pertinent case law, the trial court concluded that the proper standard was clear and convincing evidence. In reaching this determination, the trial court relied on a well-reasoned opinion from a California Court of Appeals, ***In re Michael G.,*** 74 Cal. Rptr. 2d 642 (Cal. Ct. App. 1998). The court noted that sections 1912(e) and 1912(f) specifically referred to the requisite burden of proof for the requirements in those sections. Section 1912(f) requires proof beyond a reasonable doubt, and section 1912(e) requires proof by clear and convincing evidence. The court then applied the following rule of statutory construction:

> It is a well recognized principle of statutory construction that when the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded. If Congress meant for the "active efforts" determination to be supported by evidence beyond

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[4] Debra argues that ***Santosky v. Kramer***, 455 U.S. 745 (1982) does not apply because it is not an ICWA case. Although this court agrees that ***Santosky*** is not controlling authority because it did not specifically address the burden of proof in an ICWA case, it does offer persuasive authority because it addressed the burden of proof relative to a TPR proceeding.

> a reasonable doubt, it could easily have said so.

In re Michael G., 74 Cal. Rptr. 2d at 648 (citations omitted). The trial court in Branden's case applied the same rule of statutory construction, *see* ***Outagamie County v. Town of Greenville, 2000 WI*** App 65, ¶9, 233 Wis. 2d 566, 608 N.W.2d 414, to conclude that if Congress had wanted the higher burden to apply to the active efforts determination, it certainly could have so specified.

¶21 The trial court thus concluded, based on statutory construction and the persuasive authority offered in ***Sandusky***, that the proper standard was clear and convincing evidence. This court concludes that the trial court's analysis is not erroneous. [5]

¶22 Debra's third argument is that the State failed to prove by clear and convincing evidence that it provided "active efforts" in this case. In reviewing a finding by a jury, this court applies a deferential standard of review:

> Our review of a jury's verdict is narrow. Appellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it. Moreover, if there is any credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding, we will not overturn that finding.

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[5] Debra cites ***In re D.S.P.***, 166 Wis. 2d 464, 480 N.W.2d 234 (1992) for the proposition that the higher burden should be employed. ***D.S.P.***, however did not address what burden of proof applied to § 1912(d). Therefore, ***D.S.P.*** does not control the burden of proof issue involved in the instant case.

Morden v Continental AG, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W. 2d 659 (citations omitted). The record reflects credible evidence to support the jury's finding that the State made "active efforts" in this case. Even before Brandon was recognized as an Indian child, Debra was provided with a parenting class, and alcohol and drug abuse assessment. Treatment was recommended and arranged for counseling. Debra's prison term interrupted that treatment. The Bureau brought Branden to the prison twice to see Debra, and provided a visitation schedule when Debra was released from prison. After Debra's release, the Bureau again arranged for alcohol and drug abuse treatment and random urine tests. Visitation and counseling services were provided up until the date of trial. In fact, Debra conceded that the Bureau made active efforts to provide services to her in every way except regarding visitation. Based on the foregoing, this court cannot overturn the jury's finding that active efforts were proven by clear and convincing evidence.[6]

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[6] Debra contends that the State did not prove "active efforts" as instructed by the BIA Guidelines to "take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe," and "involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers." *See* BIA Guidelines D.2 & D.2 commentary. Debra also pointed to a manual used in Iowa in these cases, which defines "active efforts" as a "vigorous and concerted level of casework beyond the level that typically constitutes reasonable efforts. " and provides steps for the Bureau to comply with the active efforts requirements. The steps are: (1) the Bureau should request the child's tribe to provide traditional support actions or services; (2) involve tribal representatives at the earliest point incase assessment and service planning; (3) consult with extended family about support services that they could provide for the child and family; (4) exhaust all family preservation alternatives deemed appropriate by the tribe before out-of-home foster care placement; (5) provide financial assistance, transportation and other services or assistance; and (6) allow frequent visits in the Indian child's home and the homes of the child's extended family members. *See* Iowa Code § 232B5(19).

¶23 Debra's fourth complaint is that the trial court erroneously modified the ICWA language for a special verdict question regarding the harm element of § 1912(f). 25 U.S.C. § 1912(f) provides:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

¶24 The trial court in this case was faced with the problem of crafting jury instructions and verdict questions that would convey the meaning and spirit of the ICWA without confusing the jury. Clearly, § 1912(f) contemplated a situation where a parent had custody of a child. That was not the situation in this case. Branden was not in the custody of Debra. Thus, instead of using the "continued custody" language, the trial court asked the jury to determine whether Branden would suffer serious emotional or physical harm if he "was removed from his current foster home and placed with Debra F[.]."

Debra's argument fails because the State does not need to comply with guidelines particular to an Indian child when the State has been told twice that the child is not an Indian child. The tribe rejected the State's early inquiries as to whether Branden was a member of the Indian tribe. During the time period when the Bureau was making efforts to return Branden to Debra, the tribe was not involved and had stated that Branden was not a member. It was not until after the TPR petition was filed that the tribe entered the case. Thus, the BIA Guidelines and the Iowa manual do not apply.

¶25 Debra argues that this change in language diverted the jury's attention away from Debra's home and inevitably required an affirmative answer. Although this court can understand Debra's concern, this court cannot conclude that the trial court's modification of the language constituted an erroneous exercise of discretion or a violation of the ICWA.

¶26 As the *guardian ad litem* points out, the harm question of § 1912(f) focuses on the *change in custody*. Our supreme court has addressed a situation similar to this one where Branden has never been in Debra's custody:

> When the child is not in the custody of the parents for a protracted period of time, as in this case, it would be irrelevant to receive testimony as to whether or not the continued custody of the child by the parents will harm the child. Therefore, testimony as to what effect returning the child to the custody of the parents will have upon the child is probative of whether the continued custody of the child by the parents is likely to result in harm to the child.

In re D.S.P., 166 Wis. 2d 464, 479, 480 N.W.2d 234 (1992). Here, placing Branden with Debra cannot be separated from removing him from the only home he has known for more than four years. The trial court's modification of the ICWA language recognized this and presented the jury with both removal and placement. Under the circumstances of this case, to follow § 1912(f) word for word would have been without logic or meaning in this case.

¶27 Debra's last complaint about the verdict involved the time frame incorporated into the harm question. Section 1912(f) does not specify a time frame. Debra argued that the question should have been read in the context of a gradual reunification plan under which Branden could be returned to Debra's custody after about six months. The State and the guardian ad litem respond that the trial court properly imputed an immediate time frame into the harm question, based on the purpose of the ICWA and the facts in this case. This court agrees.

¶28 In addressing this issue, the trial court noted the provisions of another federal act pertaining to the welfare of Indian children, the Adoption and Safe Families Act of 1997. The trial court held that statutes concerning the same subject matter or sharing the same purpose should be construed together. It determined that the adoption act required states to proceed expeditiously to permanence for children once rehabilitation efforts have failed.

¶29 The jury unanimously found in this case that Debra had failed to assume parental responsibility and that rehabilitation efforts had been unsuccessful. After over four years of trying, reunification efforts had clearly failed. Thus, to allow the jury to consider another reunification plan of six months or more would clearly contravene the objectives of the adoption act. The trial court, at every point in this case, attempted to reconcile the language of the ICWA with the specific facts and circumstances of this case so that the jury would not be confused and could make a reasonable analysis of the evidence. The trial court's actions did not constitute an erroneous exercise of discretion. Rather, the record demonstrates that the trial court fashioned jury instructions and a special verdict to comport with both the facts of this case and consistent with the purpose of the ICWA.

C. Ineffective Assistance of Counsel.

¶30 Debra claims she received ineffective assistance of counsel because her attorney failed to call an expert witness to rebut the State's expert witness, who testified that removing Branden from the foster home and returning him to Debra's custody would harm him. The trial court summarily denied the motion without conducting a hearing. This court affirms the trial court's decision.

¶31 In reviewing Debra's ineffective claim, this court presumes that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Strickland v. Washington,*** 466 U.S. 668, 690 (1984). An evidentiary hearing is not required in every case. Rather, the trial court shall conduct a fact-finding hearing on an ineffective assistance of counsel claim only when the petitioner alleges sufficient material facts that, if true, entitle him or her to relief. *See* ***State v. Bentley,*** 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). In order to satisfy this standard, it is suggested that postdisposition motions "allege the five `w's' and one `h'"; that is, who, what, where, when, why, and how." *See* ***State v. Allen,*** 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433.

¶32 If the petitioner does not raise sufficient facts, if the allegations are merely conclusory or if the record conclusively shows that the petitioner is not entitled to relief, the trial court has the discretion to deny a request for an evidentiary hearing. *See* ***Bentley,*** 201 Wis. 2d at 309-10. Here, this court cannot hold that the trial court erroneously exercised its discretion when it summarily denied Debra's claim.

¶33 Debra claims that counsel should have called Dr. Nancy Hawkins to rebut the State's expert. Debra

submitted a portion of Dr. Hawkins's deposition in support of her motion and the State submitted the deposition in its entirety for the court's review. The trial court found that Dr. Hawkins's testimony would not have been relevant to rebut the State's witness because Dr. Hawkins's opinion related to the issue of termination of Debra's parental rights, not to the issue of emotional damage that Branden would suffer if removed from the foster home and placed with Debra. Debra did not submit an affidavit or other proof to demonstrate that Dr. Hawkins would also opine on the issue of emotional harm. Thus, the trial court concluded that counsel's decision not to call Dr. Hawkins was reasonable and not prejudicial.

¶34 Debra also asserts that counsel should have found another expert to rebut the State's witness. However, Debra's motion failed to provide any evidence supporting its contention that such a witness existed. Thus, Debra's assertion was merely conclusory and insufficient to require an evidentiary hearing. The trial court's decision did not constitute an erroneous exercise of discretion.

By the Court.- Orders affirmed.

This opinion will not be published. *See WIS. STAT. RULE* 809.23(1)(b)4.

OFFICE OF THE CLERK
Supreme Court of Wisconsin
110 EAST MAIN STREET, SUITE 215
P.O. Box 1688
MADISON, WI 53701-1688
TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

June 1, 2005

To:

Hon. Joseph R. Wall
Milwaukee County Circuit
Court Judge
10201 Watertown Plank Rd.
Milwaukee, WI 53226

Dan Barlich
Milwaukee County Juvenile Clerk
10201 Watertown Plank Rd.
Milwaukee, WI 53226

Thomas C. Binger
Asst. District Attorney
Milwaukee, WI 53233

Michael J. Gonring
Joseph O. Wilson

Natalie C. Giugno
Quarles & Brady
411 E. Wisconsin Ave.
#2040
Milwaukee, WI 53202-
4461

Michael J. Vruno, Jr.
Attorney at Law
821 W. State St.
10201 Watertown
Plank Rd.
Milwaukee, WI 53226

You are hereby notified that the Court has entered the following order:

No. 2004AP2560 TPR to Branden F.: State v. Debra F.
L.C.#2002TP437

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of respondent-appellant-petitioner, Debra F., and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Cornelia G. Clark
Clerk of Supreme Court

Mr. Binger's argument is true that, why do we instruct the jury to continue if they found grounds on one. If they reach a verdict for -- or grounds on one, why do they continue. They probably don't need to but that's for another day quite frankly. So, the interrelation language will remain in.

Now, the unanimous verdict. I'm on Questions 2 and 3. I've been rereading D.S.P. here, page 474 to 475. And the court says, as mandated by the ICWA, the circuit court required that the jury unanimously agree beyond a reasonable doubt that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.

Then the court goes on to say, the circuit court also required that the jury unanimously agree that there had been active efforts made to provide remedial services and so on.

Court then says, to satisfy the requirements of the Wisconsin children's code, the circuit court then required that the jury be convinced by clear and convincing evidence that

abandonment had been proven. These jury findings fulfill the burden of proof requirements of both the IOWA and Wisconsin children's code.

And then they have that followed by a note. Although the ICWA did not explicitly require a unanimous verdict, its use is consistent with the highest burden of proof. As this issue is not presented by this review, we decline to decide whether a unanimous verdict was necessary.

Problem is, that this Supreme Court doesn't say that. Supreme Court approved of this language here but they don't say beyond a reasonable doubt. Reasonable doubt was used in the active efforts. They say unanimous verdict was required as mandated by the ICWA. The circuit court required that the jury unanimously agree beyond a reasonable doubt. The reasonable doubt on the harm issue.

And then they subsequently say -- not only do they say what the burden of proof was on the active efforts -- they have a footnote that says even they -- they say ICWA required it and the circuit court did it. They have a footnote that ICWA does not explicitly require a unanimous

verdict, but its use is consistent with the highest burden of proof. Which tells me that if you're going to have a unanimous verdict, it has to be beyond a reasonable doubt. The implication by this sentence is pretty clear to me in that all three ICWA elements have to be beyond a reasonable doubt. That is the two-parts, active efforts elements and the harm element.

The footnote says that even though ICWA didn't require a unanimous verdict, its use is consistent with the highest burden of proof. The more I read that, the more I'm convinced that beyond a reasonable doubt is the appropriate burden of proof for the active efforts element and a unanimous verdict is required. Any objections to that?

MS. JOSET: I concur. It would be beyond a reasonable doubt and unanimous verdict.

THE COURT: Mr. Binger, do you want to make a record?

MR. BINGER: This language requires that active efforts is in dicta in this case. They clearly do not consider the ramifications of the issue with regard to active efforts.

The focus of D.S.P. is to the harm

elements which require expert testimony regarding qualified expert witnesses. The harm element also raises an evaluation of continued custody by the parent would affect the child. And this isn't the entire focus of D.S.P.'s decision. The active efforts element is not part of the Court's decision. They make no finding as to it. This is almost an aside in the decision.

I don't think we have any authority on cases as to the standard of active efforts. I think there is case law from other jurisdictions which is very persuasive that active efforts should be clear and convincing. And clearly from a statutory interpretation point of view, there is no doubt in my mind when you read Section 1912(d) and the sections that follows it, (e) and (f), Congress could have put in Section 1219(d) burden of proof just like they do in the following paragraphs. They did not do so. And, as the Court pointed out, I haven't fully researched beyond that case.

Santosky makes it clear that due process in a termination of parental rights, requires that there be clear and convincing evidence. I'm not going to argue for

preponderance of the evidence standard even though the Court has invited me to do so. Nonetheless, I don't think D.S.P. can be a blinding guide here as far as our decision. I think we need to look at persuasive authority from other jurisdictions.

You know, the more I look at Section 1912(d), I think there's case law that says this is a fact finding decision for the jury. It's really interesting. The language that is in 1912(d) basically indicates that the Court must be satisfied that active efforts be made. Section 1912(e), there will be a determination made which clearly is the fact finding determination. The fact that 1912(d) uses specific language, the Court must be satisfied, suggests to me that this may not even be a decision for the fact finders but rather a preliminary jurisdiction decided by the Court. I believe we are too far along to make that argument but I think that, again, weighs in favor of not holding the State to a beyond a reasonable doubt standard on this case.

THE COURT: Okay. Ms. Joset?

MS. JOSET: The Court clearly stated

that they declined to decide whether a unanimous verdict was necessary. Now, we don't need D.S.P. to decide whether or not reasonable doubt – and I agree with unanimous verdict going with the highest burden of proof. I agree about that. We don't need D.S.P. to decide whether or not the reasonable doubt burden of proof is required in 1912(f), the emotional damage part of the verdict.

However, we don't have that type of guideline for 1912(d) and clearly D.S.P. is not deciding that issue. They're not deciding whether a unanimous verdict was necessary. And along with that, whether reasonable doubt burden of proof was necessary.

Among the cases then that Mr. Binger has provided, those courts decided that the beyond the reasonable doubt burden was not required. Because 1912(f) made it clear that it's required, 1912(d) did not, the courts from around the country that went the other way made their rulings. There was really no analysis in terms of statutory conviction. There was no analysis at all on those cases that decided beyond a reasonable doubt.

THE COURT: Okay. We'll take a 10-minute break. I need to get some -- you want to make a brief argument?

MR. BRABHAM: I concur with the Judge's analysis.

THE COURT: I haven't made a decision. I'm talking out loud what my sense is. What I've been talking about right now is clearly based on my review of D.S.P., but go on.

MR. BRABHAM: Simply, at this point, Mr. Binger wants the Court to look at persuasive authority from other jurisdictions. I think this is persuasive authority in this jurisdiction. As I said, this is as persuasive as decisions in other jurisdictions.

THE COURT: Okay. Let me take a 10-minute break.

(Break.)

THE COURT: I reviewed the determination and, Ms. Joset, do you want to make another argument?

MS. JOSET: Your Honor, I think that all three ICWA elements should be beyond a

reasonable doubt and unanimous verdict. I think D.S.P. is guidance from our own jurisdiction. The cases that Mr. Binger indicated are outside of our jurisdiction. I think D.S.P. is the case that we are now establishing on point authority and D.S.P. would be the case that we should be following.

I think based on the reading of D.S.P., I concur with the Court's thinking out loud statements prior to the break that that would require both the beyond a reasonable doubt and a unanimous verdict as to all those ICWA elements.

THE COURT: Okay.

MS. JOSET: I just -- may I interject something else?

THE COURT: On the jurisdiction, if you find that beyond a reasonable doubt is the standard, those including Michigan, Minnesota and Iowa, are all in our general area. They all accept the beyond a reasonable doubt as the standard to all three ICWA elements. South Dakota, Montana have all beyond a reasonable doubt. Beyond a lesser burden of proof have been found in Maine, Washington, North Dakota, Idaho,

and California.

MS. JOSET: There is an Iowa case, if I can find it. I was unable to --

THE COURT: Do you have that, Ms. Joset?

MS. JOSET: I'm sorry.

MR. BINGER: I handed it to Ms. Joset.

MR. VRUNO: What is the site to that?

THE COURT: What does it say?

MS. JOSET: It's In Re L.N.W., 1990, 457 N.W. 2d 17. That's requiring proof of beyond a reasonable doubt.

MR. BINGER: This was out of a Iowa case.

THE COURT: Okay. Well, I am, I am troubled by the language in D.S.P. It is dicta. It's not the issue of the court – the court decided. It's not at all the issue the court decided or what was presented to the Court.

MR. BINGER: Just one quick comment. It doesn't seem like the Supreme Court actually decided the issue before as to the harm element; so it's another limitation.

THE COURT: I am persuaded that the clear and convincing evidence standard is appropriate for

the active efforts element for a number of reasons. I don't want to make a real long record because we have a few more things on jurisdiction and we asked the jury to be back at 2:00.

The Statute here, first of all, the Court is looking at 25 U.S.C. 1912(d), (e) and (f). Section (d) is the one we're dealing with that talks about active efforts. The statute does not provide any burden at all.

Says under State law, any party shall satisfy the court that active efforts have been made. So, they're talking about a court there. What is interesting, they're not even talking about a jury trial. They're talking about a court.

Section (e) talks about a foster care situation and it specifically says clear and convincing evidence regarding the placement of the child out of the home. And (f), which we're talking about in depth, specifically states that as to the harm aspect, beyond a reasonable doubt.

We're all aware of the different levels of proof. They note in (e) clear and convincing evidence. In (f), they're talking about beyond a reasonable doubt and in (d) they

just say satisfy the court.

Again, this is a Santosky case. The burden in termination of parental rights cases have to be minimally clear and convincing evidence. I think the courts that have found it by a preponderance of evidence, active efforts, are acting consistent with what Mr. Binger proffered; that is, that it's kind of a threshold finding or maybe not. And in reading these cases, the analysis is -- there is a lack of statutory analysis.

I reference In Re the Interest of M.S., 624 N.W. 2d 678, a North Dakota Supreme Court case, pages 683 and 684. Good reasoning here. An Alaska Supreme Court case at 856 P.2d 468. This case discusses this at page 475 and again at 476. With the focus on preventing the breakup of Indian families.

In that case, quote, the committee is advised that most State laws require public or private agencies involved in child placements to resort to remedial measures and so on but that these services are rarely provided. This subsection imposes a Federal requirement in that regard with respect to Indian children and

families. It says that -- well, it's saying that there has to be these remedial measures. Doesn't say what level of proof they have to have.

Again, I want to go through these cases. Michael G, which is a Court of Appeal decision out of California, 74 Cal. Reptr. 2d 642, very lengthy analysis beginning at page 648 and continuing through 649. I would reference that I found that to be very, very persuasive just in terms of the analysis. In Re Cari B, Court of Appeal, 763 N.E.2d 917, very brief analysis on page 923.

So I note, those are the cases that I'm relying on and I am going to go with the clear and convincing evidence and five/sixths verdict. Okay. Before I get to this standard jury instruction, I think that's it on the five/sixths instruction -- I don't think anybody else has to make a record on my ruling. If you have something new, I will listen.

MS. JOSET: I do have something. It's a minor thing. On the first page of these active instruction, the paragraph that begins with the part -- I think it's like the fourth paragraph.

THE COURT: First page?

QUESTION 2: From July 11, 2002, through today's date, has the Bureau of Milwaukee Child Welfare made active efforts to provide remedial services and rehabilitative programs designed to assist Debra [redacted] in regaining custody of Branden [redacted]?

QUESTION 3: Have the efforts referred to in Question 2 proven unsuccessful?

QUESTION 4: Is it likely that Branden [redacted] will suffer serious physical or emotional harm if, upon conclusion of this trial, he is removed from his current foster placement, placed with Debra [redacted], and continued in her custody?

The term "likely" means that there is a real and significant probability of serious physical or emotional harm, rather than an imaginary one.

The burden of proof as to Questions 1, 2, and 3 of the Special Verdict is upon the Petitioner to convince you to a reasonable certainty by evidence that is clear, satisfactory and convincing that the question should be answered "yes." If you are not so satisfied, you must answer that particular question "no."

Clear, satisfactory, and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. If you have to guess what the answer should be after discussing all evidence which relates to a particular question, then the party. having the burden of proof as to that question has not met the required burden. Your answer to Questions 1, 2, and 3 of the Special Verdict must be agreed upon by at least 10 of the 12 jurors. Jurors have a duty to consult with one another and to deliberate for the purpose of reaching agreement. If you can do so consistently with your duty as a juror, at least the same ten jurors should concur in all the answers made. I ask you to be unanimous if you can. At the foot of the verdict, you will find a place provided where dissenting jurors, if there be any, will sign their names

The burden of proof as to Question 4 of the Special Verdict is upon the Petitioner to convince you beyond a reasonable doubt that the answer to that question should be "yes." Before you can answer "yes" to Question 4 of the Special Verdict, the evidence must satisfy you beyond a reasonable doubt that the facts necessary to support the elements in that question have been proven.

The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means such doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.

A reasonable doubt is not a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or fear to return an answer of "yes" to the question in the Special Verdict is not a reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision. While it is your duty to give Debra [redacted] the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth.

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY
CHILDREN'S DIVISION

In the Interest of
Branden [redacted] Case No. 02TP000437

Child Under the Age of Eighteen

SPECIAL VERDICT

QUESTION 1: Has Debra [redacted] failed to assume parental responsibility for Branden [redacted]?

YES _____
(Yes or No)

_____
Dissenting Juror

s/ Sarah Grubb
Presiding Juror

_____
Dissenting Juror

If you answered Question 1 "Yes," answer Question 2.
QUESTION 2: From July 11, 2002, through today's date, has the Bureau of Milwaukee Child Welfare made active efforts to provide remedial services and rehabilitative programs designed to assist Debra [redacted] in regaining custody of Branden [redacted].

YES _____
(Yes or No)

_____
Dissenting Juror

s/ Sarah Grubb
Presiding Juror

_____
Dissenting Juror

If you answered Question 2 "Yes," answer Question 3.

QUESTION 3: Have the efforts referred to in Question 2 proven unsuccessful?

YES	
(Yes or No)	Dissenting Juror
s/ Sarah Grubb	
Presiding Juror	Dissenting Juror

If you answered Question 3 "Yes," answer Question 4.

QUESTION 4: Is it likely that Branden [redacted] will suffer serious physical or emotional harm if, upon conclusion of this trial, he is removed from his current foster placement, placed with Debra [redacted] and continued in her custody?

YES
(Yes or No)

s/ Sarah Grubb
Presiding Juror

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

IN THE INTEREST OF BRANDEN F.,
CHILD UNDER THE AGE OF EIGHTEEN

STATE OF WISCONSIN,

Petitioner-Respondent,

v. **Appeal No. 04-2560**

DEBRA F.,

Respondent-Appellant.

ON APPEAL FROM THE CIRCUIT COURT FOR
MILWAUKEE COUNTY
THE HONORABLE JOSEPH R. WALL PRESIDING
CASE NO. 02-TP-000437

BRIEF OF RESPONDENT-APPELLANT DEBRA F.

MICHAEL J. GONRING
State Bar No. 1003926
NATALIE C. GIUGNO
State Bar No. 1050356
JOSEPH O. WILSON
State Bar No. 1052468
QUARLES & BRADY LLP
411 East Wisconsin Avenue
Milwaukee WI 53202
414.277.5000

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trial court initially stated that the "active efforts" requirement mandated proof beyond a reasonable doubt.[107] However, the court later changed course and found that D.S.P. did not decide the issue.[108]

Although not binding, the language in D.S.P. should have been viewed as persuasive by the trial court, especially because it is the only published Wisconsin Supreme Court decision that addresses the burden requirements under ICWA.

Next, the trial court cited Santosky to support its adoption of the clear and convincing evidence standard.[109] Notably, Santosky, although a TPR case, was not an ICWA case.[110] In. that case, the Court held that due process required a minimum standard of proof of clear and convincing

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[107] R.95 at 200.

[108] R.54 at 3 n.1; R.95 at 206.

[109] R.54 at 6-7; R.95 at 208.

[110] Santosky, 455 U.S. 745, 102 S. Ct. 1388

evidence in TPR proceedings, because (1) the private interests affected by the proceedings are "commanding"; (2) the risk of error created by the State's chosen procedure is "substantial"; and (3) the countervailing government interest in supporting the use of the challenged procedure is "comparatively slight."[111]

The Court compared the fact-finding stage in a TPR proceeding to that of a criminal trial, because the subjective standards created a high risk of error.[112] Finally, the Court recognized that TPR proceedings "are often vulnerable to judgments based on cultural bias."[113]

Santosky commands that all TPR proceedings require a burden of proof of at least clear and convincing evidence. But ICWA creates additional protections for the parent and

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[111] Id. at 758, 102 S. Ct. at 1397.

[112] Id. at 762, 102 S. Ct. at 1399.

[113] Id. at 763, 102 S. Ct. at 1400.

requires a higher burden of proof in TPR proceedings.[114] For instance, § 1912(d) requires that the State make active efforts to prevent the breakup of the Indian family, and § 1912(f) requires the State to prove beyond a reasonable doubt, using expert testimony, that the child will likely suffer serious emotional or physical harm if returned to the parent's custody.[115] Therefore, where ambiguous, ICWA should be interpreted to provide a higher rather than lower burden of proof requirement that would provide greater protection for the parent.

Moreover, ICWA was created as a response to the extreme cultural bias against American Indians.[116] As explicitly recognized by ICWA,[117] there is an even greater

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[114] See 25 U.S.C. § 1912(d), (f).

[115] Id. at § 1912(d), (f).

[116] Id. at § 1901(4)-(5).

[117] Id. at § 1901(5).

risk for cultural bias in ICWA proceedings against Indian parents than in normal TPR proceedings, further supporting the need for a higher burden of proof.

Other jurisdictions are split over whether the State must prove "active efforts" by clear and convincing evidence or proof beyond a reasonable doubt.[118] The trial court cited several decisions by courts adopting the clear and convincing evidence standard, but it ignored the better reasoned decisions that adopted the higher standard.[119] Contrary to the State's argument and the trial court's finding, those decisions provided compelling reasons why "active efforts" must be proved beyond a reasonable doubt.

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[118] R.54 at 3-7; See In the Matter of G.S. & S.S., 2002 MT 245, ¶ 31, 312 Mont. 108, 119, 59 P.3d 1063, 1071 (lists cases reflecting split among courts).

[119] R.54 at 3-7; R.95 at 208-09.

STATE OF WISCONSIN
COURT OF APPEALS OF WISCONSIN
DISTRICT I

In re the Termination of Parental Rights to Branden F.,
A person Under The Age Of Eighteen:

STATE OF WISCONSIN,

Petitioner-Respondent,

v. Appeal No. 04-2560

DEBRA F.,

Respondent-Appellant.

ON APPEAL FROM THE CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE JOSEPH R. WALL PRESIDING
CASE NO. 02-TP-000437

REPLY BRIEF OF RESPONDENT-APPELLANT DEBRA F.

MICHAEL J. GONRING
State Bar No. 1003926
NATALIE C. GIUGNO
State Bar No. 1050356
JOSEPH O. WILSON
State Bar No. 1052468
QUARLES & BRADY LLP
411 East Wisconsin Avenue
Milwaukee WI 53202
414.277.5000

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sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by *at least* clear and convincing evidence."[47]

When applied correctly, ICWA provides additional protections to parents like Debra. Here, the trial court stripped § 1912(d) of its protections. Contrary to the State's incredible assertion,[48] Debra's Due Process protection was certainly not enhanced when the trial court submitted § 1912(d) to the jury with a lesser burden of proof.

Even under the lesser burden, the State failed to prove it had made active efforts. The State emphasizes the shortened time frame in which it was required to provide active efforts.[49] But the time frame is irrelevant. The State *never* provided active efforts within the meaning contemplated by IOWA and the BIA Guidelines.

In fact, neither the State nor GAL even attempt to show that the Bureau complied with the instructions given in the BIA Guidelines: (1) "Indian family" means more than the

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[47] Santosky v. Kramer, 455 U.S. 745, 747, 747-48, 102 S. Ct. 1388, 1391-92 (1982).

[48] State's Br. at 38-39

[49] State's Br. at 30-31

STATE OF WISCONSIN
SUPREME COURT

In re the Termination of Parental Rights to Branden F.,
A person Under The Age Of Eighteen:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

DEBRA F.,

Respondent-Appellant-Petitioner.

Appeal from a final Judgment of the Court of Appeals,
District I, of the State of Wisconsin
Court of Appeals Case No. 04-CV-2560
District Court Case No. 02-TP-000437

PETITION FOR REVIEW

MICHAEL J. GONRING
State Bar No. 1003926
JOSEPH O. WILSON
State Bar No. 1052468
NATALIE C. GIUGNO
State Bar No. 1050356
QUARLES & BRADY LLP
411 East Wisconsin Avenue
Milwaukee WI 53202
414.277.5000
Attorney for Respondent-Appellant-Petitioner

burden of proof required to prove "active efforts" depends on the nature of the proceeding: in a foster care placement proceeding, "active efforts" must be proved by clear and convincing evidence; in a termination of parental rights proceeding, "active efforts" must be proved beyond a reasonable doubt.[79]

The lower courts also misconstrued the holding in Santosky, finding that it supported the decision that § 1912(d) need only be proved by clear and convincing evidence. Yet Santosky was not a TPR case where the ICWA applied. Rather, the United States Supreme Court held that due process requires states to support their allegations under state law in TPR cases by *at least* clear and convincing evidence.[80] It was *not* a TPR case that invoked the ICWA.

The ICWA was enacted to provide *additional* protections for the parent, and it requires a higher burden of proof in TPR proceedings.[81] The ICWA was created as a response to the extreme cultural bias against American Indians.[82] As explicitly recognized by the ICWA,[83] there is an even *greater* risk for cultural bias in TPR proceedings against Indian parents than against non-Indian parents, further supporting the need for a higher burden of proof.

This Court now has the opportunity to squarely address this issue and clarify the law on this point. The trial courts in Shannon R. and D.S.P. required the State to prove

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[79] In the Matter of M.S.S., 465 N.W.2d 412, 418 (Minn. Ct. App. 1991); In the Interest of S.R., 323 N.W.2d 885, 887 (S.D. 1992); In re Morgan, 140 Mich. App. 594, 604, 364 N.W.2d 754, 758 (1985); In the Matter of Kreft, 148 Mich. App. 682, 693, 384 N.W.2d 843, 849 (1986); In re L.N.W., 457 N.W.2d 17, 19 (Iowa Ct. App.1990); In the Matter of G.S. & S.S., 2002 MT 245,¶ 33, 312 Mont. 108, 120, 59 P.3d 1063, 1071.

[80] Santosky v. Kramer, 455 U.S. 745, 769, 102 S. Ct. 1388, 1403 (1982).

[81] 25 U.S.C. § 1912 (f).

[82] Id. at § 1901 (4)-(5).

[83] Id. at § 190 (5).

the "active efforts" requirement beyond a reasonable doubt. The trial court in this case required proof beyond a reasonable doubt. This Court should accept review to harmonize the law on this crucial issue.

V. THE "GOOD CAUSE" REQUIREMENT OF § 1911(b) SHOULD BE STRICTLY CONSTRUED TO GIVE EFFECT TO CONGRESS' PREFERENCE THAT PROCEEDINGS INVOLVING INDIAN CHILDREN BE HEARD BY TRIBAL COURTS.

Section 1911(b) requires the transfer of proceedings involving Indian children to Tribal courts absent "good

67584 Federal Register / Vol. 44, No. 228 / Monday, November 26, 1979

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Guidelines for State Courts; Indian Child Custody Proceedings

This notice is published in exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indiana Affairs by 209 DM 8.

There was published in the Federal Register, Vol. 44, No. 79 / Monday, April 23, 1979 a notice entitled Recommended Guidelines for State Courts—Indian Child Custody Proceedings. This notice pertained directly to implementation of the Indian Child Welfare Act of 1978, Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1901 *et seq.* A subsequent Federal Register notice which invited public comment concerning the above was published on June 5, 1979. As a result of comments received, the recommended guidelines were revised and are provided below in final form.

Introduction

Although the rulemaking procedures of the Administrative Procedures Act have been followed in developing these guidelines, they are not published as regulations because they are not intended to have binding legislative effect. Many of these guidelines represent the interpretation of the Interior Department of certain provisions of the Act. Other guidelines provide procedures which, if followed, will help assure that rights guaranteed by the Act are protected when state courts decide Indian child custody matters. To the extent that the Department's interpretations of the Act are correct, contrary interpretations by the courts

would be violations of the Act. If procedures different from those recommended in these guidelines are adopted by a state, their adequacy to protect rights guaranteed by the Act will have to be judged on their own merits.

Where Congress expressly delegates to the Secretary the primary responsibility for interpreting a statutory term, regulations interpreting that term have legislative effect. Courts are not free to set aside those regulations simply because they would have interpreted that statute in a different manner. Where, however, primary responsibility for interpreting a statutory term rests with the courts, administrative interpretations of statutory terms are given important but not controlling significance. *Batterton v. Francis*, 432 U.S. 416, 424-425 (1977).

In other words, when the Department writes rules needed to carry out responsibilities Congress has explicitly imposed on the Department, those rules are binding. A violation of those rules is a violation of the law. When, however, the Department writes rules or guidelines advising some other agency how it should carry out responsibilities explicitly assigned to it by Congress, those rules or guidelines are not, by themselves, binding. Courts will take what this Department has to say into account in such instances, but they are free to act contrary to what the Department has said if they are convinced that the Department's guidelines are not required by the statute itself.

Portions of the Indian Child Welfare Act do expressly delegate to the Secretary of the Interior responsibility for interpreting statutory language. For example, under 25 U.S.C. 1918, the Secretary is directed to determine whether a plan for reassumption of jurisdiction is "feasible" as that term is used in the statute. This and other areas where primary responsibility for implementing portions of the Act rest with this Department are covered in regulations promulgated on July 31, 1979 at 44 FR 45092.

Primary responsibility for interpreting other language used in the Act, however, rests with the courts that decide Indian child custody cases. For example, the legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. S. Rep. No. 95-597, 95th Cong., 1st Sess. 17 (1977). The Department's interpretation of statutory language of this type is published in these guidelines.

Some commenters asserted that Congressional delegation to this Department of authority to promulgate regulations with binding legislative effect with respect to all provisions of the Act is found at 25 U.S.C. 1952, which states, "Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." Promulgation of regulations with legislative effect with respect to most of the responsibilities of state or tribal courts under the Act, however, is not necessary to carry out the Act. State and tribal courts are fully capable of carrying out the responsibilities imposed on them by Congress without being under the direct supervision of this Department.

Nothing in the legislative history indicates that Congress intended this Department to exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody matters. For Congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step.

Nothing in the language or legislative history of 25 U.S.C. 1952 compels the conclusion that Congress intended to vest this Department with such extraordinary power. Both the language and the legislative history indicate that the purpose of that section was simply to assure that the

Department moved promptly to promulgate regulations to carry out the responsibilities Congress had assigned it under the Act. Assignment of supervisory authority over the courts to an administrative agency is a measure so at odds with concepts of both federalism and separation of powers that it should not be imputed to Congress in the absence of an express declaration of Congressional intent to that effect.

Some commenters also recommended that the guidelines be published as regulations and that the decision of whether the law permits such regulations to be binding be left to the court. That approach has not been adopted because the Department has an obligation not to assert authority that it concludes it does not have.

Each section of the revised guidelines is accompanied by commentary explaining why the Department believes states should adopt that section and to provide some guidance where the guidelines themselves may need to be interpreted in the light of specific circumstances.

The original guidelines used the word "should" instead of "shall" in most provisions. The term "should" was used to communicate the fact that the guidelines were the Department's interpretations of the Act and were not intended to have binding legislative effect. Many commenters, however, interpreted the use of "should" as an attempt by this Department to make statutory requirements themselves optional. That was not the intent. If a state adopts those guidelines, they should be stated in mandatory terms. For that reason the word "shall" has replaced "should" in the revised guidelines. The status of these guidelines as interpretive rather than legislative in nature is adequately set out in the introduction.

In some instances a state may wish to establish rules that provide even greater protection for rights guaranteed by the Act than those suggested by these guidelines. These guidelines are not intended to discourage such action. Care

should be taken, however, that the provision of additional protections to some parties to a child custody proceeding does not deprive other parties of rights guaranteed to them by the Act.

In some instances the guidelines do little more than restate the statutory language. This is done in order to make the guidelines more complete so that they can be followed without the need to refer to the statute in every instance. Omission of any statutory language, of course, does not in any way affect the applicability of the statute.

A number of commenters recommended that special definitions of residence and domicile be included in the guidelines. Such definitions were not included because these terms are well defined under existing state law. There is no indication that these state law definitions tend to undermine in any way the purposes of the Act. Recommending special definitions tend to undermine in any way the purposes of the Act. Recommending special definitions for the purpose of this Act alone would simply provide unnecessary complications in the law.

A number of commenters recommended that the guidelines include recommendations for tribal-state agreements under 25 U.S.C. 1919. A number of other commenters, however, criticized the one provision in the original guidelines addressing that subject as tending to impose on such agreements restrictions that Congress did not intend should be imposed. Because of the wide variation in the situations and attitudes of states and tribes, it is difficult to deal with that issue in the context of guidelines. The Department is currently developing materials to aid states and tribes with such agreements. The Department hopes to have those materials available later this year. For these reasons, the provision in the original guidelines concerning tribal-state agree. .ents has been deleted from the guidelines.

The Department has also received many requests for assistance form tribal courts in carrying out the new responsibilities resulting from the passage of this Act. The Department intends to provide additional guidance and assistance in that area also in the future. Providing guidance to state courts was given a higher priority because the Act imposes many more procedures on state courts than it does on tribal courts.

Many commenters have urged the Department to discuss the effect of the Act on the financial responsibilities of states and tribes to provide services to Indian children. Many such services are funded in large part by the Department of Health, Education, and Welfare. The policies and regulations of that Department will have a significant impact on the issue of financial responsibility. Officials of Interior and HEW will be discussing this issue with each other. It is anticipated that more detailed guidance on questions of financial responsibility will be provided as a result of those consultations.

One commenter recommended that the Department establish a monitoring procedure to exercise its right under 25 U.S.F. 1915(e) to review state court placement records. HEW currently reviews state placement records on a systematic basis as part of its responsibilities with respect to statutes it administers. Interior Department officials are discussing with HEW officials the establishment of a procedure for collecting data to review compliance with the Indian Child Welfare Act.

Inquiries concerning these recommended guidelines may be directed to the nearest of the following regional and field offices of the Solicitor for the Interior Department:

Office of the Regional Solicitor, Department of the Interior, 510 L Street, Suite 408, Anchorage, Alaska 99501. (907) 285-5301.

Office of the Regional Solicitor, Department of the Interior, Richard B. Russell Federal building, 75 spring St., SW., Suite 1328, Atlanta, Georgia 30303. (404) 221-4447.

Office of the Regional Solicitor, Department of the Interior, c/o U.S. Fish & Wildlife Service, Suite 306, 1 Gateway Center, Newton Corner, Massachusetts 02158. (817) 829-9258.

Office of the Field Solicitor, Department of the Interior, 888 Federal Building, Fort Snelling, Twin Cities, Minnesota 53111. (612) 725-3540.

Office of the Regional Solicitor, Department of the Interior, P.O. Box 25007, Denver, Federal Center, Denver, Colorado 80225. (303) 234-3175.

Office of the Field Solicitor, Department of the Interior, P.O. Box 549, Aberdeen, South Dakota 57401. (605) 225-7254.

Office of the Field Solicitor, Department of the Interior, P.O. Box 1538, Billings, Montana 59103. (406) 245-6711.

Office of the Regional Solicitor, Department of the Interior, Room E-2753, 2800 Cottage Way, Sacramento, California 95825 (916) 484-1331.

Office of the Field Solicitor, Department of the Interior, Valley Bank Center, Suite 280, 201 North Central Avenue, Phoenix, Arizona 85073 (802) 281-4758

Office of the Field Solicitor, Department of the Interior, 3810 Central Avenue, Suite 104, Riverside, California 92508 (714) 787-1560.

Office of the Field Solicitor, Department of the Interior, Window Rock, Arizona 86515. (602) 871-5151.

Office of the Regional Solicitor, Department of the Interior, Room 3068, Page Belcher Federal Building, Tulsa, Oklahoma 74103. (918) 581-7501.

Office of the Field Solicitor, Department of the Interior, Room 7102, Federal Building and Courthouse, 500 Gold Avenue, S.W., Albuquerque, New Mexico 87101. (505) 766-2547.

Office of the Field Solicitor, Department of the Interior, P.O. Box 397, W.C.D. Office Building, Route 1, Anadarko, Oklahoma 73005 (405) 247-6673.

Office of the Field Solicitor, Department of the Interior, P.O. Box 1508, Room 319, Federal Building, 5th and Broadway, Muskogee, Oklahoma 74401. (918)683-3111.

Office of the Field Solicitor, Department of the Interior, c/o Osage Agency, Grandview Avenue, Pawhuska, Oklahoma 74058 (918)287-2431.

Office of the Regional Solicitor, Department of the Interior, Suite 6201, Federal Building, 125 South State Street, Salt Lake City, Utah 84138. (901) 524-5877.

Office of the Regional Solicitor, Department of the Interior, Lloyd 500 Building, Suite 807, 500 N.E. Multnomah Street, Portland, Oregon 97232. (503) 231-2125.

Guidelines for State Courts

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A. Policy

(1) Congress through the Indian Child Welfare Act has expressed its clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own families or Indian tribes. Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to thee preferences. The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines and any state statutes, regulations or rules promulgated to implement the Act shall be liberally construed in favor of a result that is consistent with these

preferences. Any ambiguities in any of such statutes, regulations, rules or guidelines shall be resolved in favor of the result that is most consistent with these preferences.

(2) In any child custody proceeding where applicable state or other federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Indian Child Welfare Act, the state court shall apply the state or other federal law, provided that application of that law does not infringe any right accorded by the Indian Child Welfare Act to an Indian tribe or child.

B. Pretrial requirements

B.1 Determination That Child Is An Indian

(a) When a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child's status from either the Bureau of Indian Affairs or the child's tribe. In a voluntary placement proceeding where a consenting parent evidences a desire for anonymity, the court shall make its inquiry in a manner that will not cause the parent's identity to become publicly known.

(b)(i) The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive.

(ii) Absent a contrary determination by the tribe that is alleged to be the Indian child's tribe, a determination by the Bureau of Indian Affairs that a child is or is not an Indian child is conclusive.

(c) Circumstances under which a state court has reason to believe a child involved in a child custody proceeding is an Indian include but are not limited to the following:

(i) Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child.

(ii) Any public or state licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child.

(iii) The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child.

(iv) The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.

(v) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

B.2 Determination of Indian Child's Tribe

(a) Where an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe but is not a member of any of them, the court is called upon to determine with which tribe the child has more significant contacts.

(b) The court shall send the notice specified in recommended guideline B.4. to each such tribe. The notice shall specify the other tribe or tribes that are being considered as the child's tribe and invite each tribe's views on which tribe shall be so designated.

(c) In determining which tribe shall be designated the Indian child's tribe, the court shall consider, among other things, the following factors:

(i) length of residence on or near the reservation of each tribe and frequency of contacts with each tribe;

(ii) child's participation in activities of each tribe;

(iii) child's fluency in the language of each tribe;

(iv) whether there has been a previous adjudication with respect to the child by a court of one of the tribes;

(v) residence on or near one of the tribes' reservation by the child's relatives;

(vi) tribal membership of custodial parent or Indian custodian;

(vii) interest asserted by each tribe in response toe the notice specified in subsection B.2(b) of these guidelines; and

(viii) the child's self identification.

(d) The court's determination together with the reasons for it shall be set out in a written document and made a part of the record of the proceeding. A copy of that document shall be sent to each party to the proceeding and to each person or governmental agency that received notice of the proceeding.

(e) If the child is a member of only one tribe, that tribe shall be designated the Indian child's tribe even though the child is eligible for membership in another tribe. If a child becomes a member of one tribe during or after the proceeding, that tribe shall be designated as the Indian child's tribe with respect to all subsequent actions related to the proceeding. If the child becomes a member of a tribe other than the one designated by the court as the Indian child's tribe, actions taken based on the court's determination prior to the child's becoming a tribal member continue to be valid.

B.3. Determination That Placement Is Covered by the Act

(a) Although most juvenile delinquency proceedings are not covered by the Act, the Act does apply to status offenses, such as truancy and incorrigibility, which can

only be committed by children, and to any juvenile delinquency proceeding that results in the termination of a parental relationship.

(b) Child custody disputes arising in the context of divorce or separation proceedings or similar domestic relations proceedings are not covered by the Act so long as custody is awarded to one of the parents.

(c) Voluntary placements which do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child at any time are not covered by the Act. Where such placements are made pursuant to a written agreement, that agreement shall state explicitly the right of the parent or custodian to regain custody of the child upon demand.

B.4 Determination of Jurisdiction

(a) In any Indian child custody proceeding in state court, the court shall determine the residence and domicile of the child. Except as provided in Section B.7 of these guidelines, if either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the proceedings in state court shall be dismissed.

(b) If the Indian child has previously resided or been domiciled on the reservation, the state court shall contact the tribal court to determine whether the child is a ward of the tribal court. Except as provided in Section B.7 of these guidelines, if the child is a ward of a tribal court, the state court proceedings shall be dismissed.

B.5. Notice Requirements

(a) In any involuntary child custody proceeding, the state court shall make inquiries to determine if the child involved is a member of an Indian tribe or if a parent of the

child is a member of an Indian tribe and the child is eligible for membership in an Indian tribe.

(b) In any involuntary Indian child custody proceedings, notice of the proceeding shall be sent to the parents and Indian custodians, if any, and to any tribes that may be the Indian child's tribe by registered mail with return receipt requested. The notice shall be written in clear and understandable language and include the following information:

(i) The name of the Indian child.

(ii) His or her tribal affiliation.

(iii) A copy of the petition, complaint or other document by which the proceeding was initiated.

(iv) The name of the petitioner and the name and address of the petitioner's attorney.

(v) A statement of the right of the biological parents or Indian custodians and the Indian child's tribe to intervene in the proceeding.

(vi) A statement that if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent them.

(vii) A statement of the right of the natural parents or Indian custodians and the Indian child's tribe to have, on request, twenty days (or such additional time as may be permitted under state law) to prepare for the proceedings.

(vii) The location, mailing address and telephone number of the court.

(ix) A statement of the right of the parents or Indian custodians or the Indian child's tribe to petition the court to transfer the proceeding to the Indian child's tribal court.

(x) The potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians.

(xi) A statement in the notice to the tribe that since child custody proceedings are unusually conducted on a confidential basis, tribal officials should keep confidential the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's right under the Act.

(c) The tribe, parents or Indian custodians receiving notice from the petitioner of the pendency of a child custody proceeding has the right, upon request, to be granted twenty days (or such additional time as may permitted under state law) from the date upon which the notice was received to prepare for the proceeding.

(d) The original or a copy of each notice sent pursuant to this section shall be filed with the court together with any return receipts or other proof of service.

(e) Notice may be personally served on any person entitled to receive notice in lieu of mail service.

(f) If a parent or Indian custodian appears in court without an attorney, the court shall inform him or her of the right to appointed counsel, the right to request that the proceeding be transferred to tribal court or to object to such transfer, the right to request additional time to prepare for the proceeding and the right (if the parent or Indian custodian is not already a party) to intervene in the proceedings.

(g) If the court or a petitioning party has reason to believe that a parent or Indian custodian is not likely to understand the contents of the notice because of lack of adequate comprehension of written English, a copy of the notice shall be sent to the Bureau of Indian Affairs agency nearest to the residence of that person requesting that Bureau

of Indian Affairs personnel arrange to have the notice explained to that person in the language that he or she best understands.

B.6. Time Limits and Extensions

(a) A tribe, parent or Indian custodian entitled to notice of the pendency of a child custody proceeding has a right, upon request, to be granted an additional twenty days from the date upon which notice was received to prepare for participation in the proceeding.

(b) The proceeding may not begin until all of the following dates have passed:

(i) ten days after the parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown in the petitioner) has received notice;

(ii) ten days after the Indian child's tribe (or the Secretary if the Indian child's tribe is unknown to the petitioner) has received notice;

(iii) thirty days after the parent or Indian custodian has received notice if the parent or Indian custodian has requested an additional twenty days to prepare for the proceeding and

(iv) Thirty days after the Indian child's tribe has received notice if the Indian child's tribe has requested an additional twenty days to prepare for the proceeding.

(c) The time limits listed in this section are the minimum time periods required by the Act. The court may grant more time to prepare where state law permits.

B.7. Emergency Removal of an Indian Child

(a) Whenever an Indian child is removed from the physical custody of the child's parents or Indian custodians pursuant to the emergency removal or custody provisions of

state law, the agency responsible for the removal action shall immediately cause an inquiry to be made as to the residence and domicile of the child.

(b) When a court order authorizing continued emergency physical custody is sought, the petition for that order shall be accompanied by an affidavit containing the following information:

(i) The name, age and last known address of the Indian child.

(ii) The name and address of the child's parents and Indian custodians, if any, if such persons are unknown, a detailed explanation of what efforts have been made to locate them shall be included.

(iii) Facts necessary to determine the residence and the domicile of the Indian child and whether either the residence or domicile is on an Indian reservation. If either the residence or domicile is believed to be on an Indian reservation, the name of the reservation shall be stated.

(iv) The tribal affiliation of the child and of the parents and/or Indian custodians.

(v) A specific and detailed account of the circumstances that lead the agency responsible for the emergency removal of the child to take that action.

(vi) If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody maters, a statement of efforts that have been made and are being made to transfer the child to the tribe's jurisdiction.

(vii) A statement of the specific actions that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody.

(c) If the Indian child is not restored to the parents or Indian custodians or jurisdiction is not transferred

to the tribe, the agency responsible for the child's removal must promptly commence a state court proceeding for foster care placement. If the child resides or is domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, such placement must terminate as soon as the imminent physical damage or harm to the child which resulted in the emergency removal no longer exists or as soon as the tribe exercises jurisdiction over the case – whichever is earlier.

(d) Absent extraordinary circumstances, temporary emergency custody shall not be continued for more than 90 days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

B.8. Improper Removal From Custody

(a) If, in the course of any Indian child custody proceeding, the court has reason to believe that the child who is the subject of the proceeding may have been improperly removed from the custody of his or her parent or Indian custodian or that the child has been improperly retained after a visit or other temporary relinquishment of custody, and that the petitioner is responsible for such removal or retention, the court shall immediately stay the proceedings until a determination can be made on the question of improper removal or retention.

(b) If the court finds that the petitioner is responsible for an improper removal or retention, the child shall be immediately returned to his or her parents or Indian custodian.

C. Requests for Transfer to Tribal Court

C.1. Petitions under 25 U.S.C. §1911(b) for transfer of proceeding

Either parent, the Indian custodian or the Indian child's tribe may, orally or in writing, request the court to transfer the Indian child custody proceeding to the tribal court of the child's tribe. The request shall be made promptly after receiving notice of the proceeding. If the request is made orally it shall be reduced to writing by the court and made a party of the record.

C.2. Criteria and Procedures for Ruling on 25 U.S.C. §1911(b) Transfer Petitions

(a) Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child's tribe, the court must transfer unless either parent objects to such transfer, the tribal court declines jurisdiction, or the court determines that good cause to the contrary exists for denying the transfer.

(b) If the court believes or any party asserts that good cause to the contrary exists, the reasons for such belief or assertion shall be stated in writing and made available to the parties who are petitioning for transfer. The petitioners shall have the opportunity to provide the court with their views on whether or not good cause to deny transfer exists.

C.3. Determination of Good Cause to the Contrary

(a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:

(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner

did not file the petition promptly after receiving notice of the hearing.

(ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of the child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

C.4. Tribal Court Declination of Transfer

(a) A tribal court to which transfer is requested may decline to accept such transfer.

(b) Upon receipt of a transfer petition the state court shall notify the tribal court in writing of the proposed transfer. The notice shall state how long the tribal court has to make its decision. The tribal court shall have at least twenty days from the receipt of notice of a proposed transfer to decide whether to decline the transfer. The tribal court may inform that state court of its decision to decline either orally or in writing.

(c) Parties shall file with the tribal court any arguments they wish to make either for or against tribal declination of transfer. Such arguments shall be made orally in open court or in written pleadings that are served on all other parties.

(d) If the case is transferred the state court shall provide the tribal court with all available information on the case.

D. Adjudication of Involuntary Placements, Adoptions, or Terminations or Termination of Parental Rights

D.1. Access to Reports

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child has the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based. No decision of the court shall be based on any report or other document not filed with the court.

D.2. Efforts To Alleviate Need To Remove Child From Parents or Indian Custodians

Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to the commencement of the proceeding active efforts have been made to alleviate the need to remove the Indian child from his or her parents or Indian custodians. These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian caregivers.

D.3. Standards of Evidence

(a) The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one of more qualified expert witnesses, demonstrating that the child's continued custody with the child's parents of

Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or non-conforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result.

D.4. Qualified Expert Witnesses

(a) Removal of an Indian child from his or her family must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child.

(b) Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

(i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in

tribal customs as they pertain to family organization and childrearing practices.

(ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

(iii) A professional person having substantial education and experience in the area of his or her specialty.

(c) the court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

E. Voluntary Proceedings

E.1. Execution of Consent

To be valid, consent to a voluntary termination of parental rights or adoption must be executed in writing and recorded before a judge or magistrate of a court of competent jurisdiction. A certificate of the court must accompany any consent and must certify that the terms and consequences of the consent were explained in detail and in the language of the parent or Indian custodian, if English is not the primary language, and were fully understood by the parent or Indian custodian. Execution of consent need not be in open court where confidentiality is requested or indicated.

E.2. Content of Consent Document

(a) The consent document shall contain the name and birth date of the Indian child, the name of the Indian child's tribe, any identifying number or other indication of the child's membership in the tribe, if any, and the name and address of the consenting parent or Indian custodian.

(b) A consent to foster care placement shall contain, in addition to the information specified in (a), the name and address of the person or entity by or through whom the placement was arranged, if any, or the name and address of the prospective foster parents, if known at the time.

(c) A consent to termination of parental rights or adoption shall contain, in addition to the information specified in (a), the name and address of the person or entity by or though whom any preadoptive or adoptive placement has been or is to be arranged.

E.3. Withdrawal of Consent to Placement

Where a parent or Indian custodian has consented to a foster care placement under state law, such consent may be withdrawn at any time by filing, in the court where consent was executed and filed, an instrument executed by the parent or Indian custodian. When a parent or Indian custodian withdraws consent to foster care placement, the child shall as soon as is practicable be returned that that parent or Indian custodian.

E.4. Withdrawal of Consent to Adoption

A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a final decree of voluntary termination or adoption by filing in the court where the consent is filed an instrument executed under oath by the parent stipulating his or her intention to withdraw such consent. The clerk of the court where the withdrawal of consent is filed shall promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing and that party shall insure the return the child to the parent as soon as practicable.

F. Dispositions

F.1. Adoptive Placements

(a) In any adoptive placement of an Indian child under state law preference must be given (in the order listed below) absent good cause to the contrary, to placement of the child with:

(i) A member of the child's extended family;

(ii) Other members of the Indian child's tribe; or

(iii) Other Indian families, including families of single parents.

(b) The Indian child's tribe may establish a different order of preference by resolution. That order of preference must be followed so long as placement is the least restrictive setting appropriate to the child's needs.

(c) Unless a consenting parent evidences a desire for anonymity, the court or agency shall notify the child's extended family and the Indian child's tribe that their members will be given preference in the adoption decision.

F.2. Foster Care or Preadoptive Placements

In any foster care or preadoptive placement of an Indiar child:

(a) The child must be placed in the least restrictive setting which

(i) most approximates a family;

(ii) in which his or her special needs may be met and

(iii) which is in reasonable proximity in his or her home.

(b) Preference must be given in the following order, absent good cause to the contrary, to placement with:

(i) A member of the Indian child's extended family;

(ii) A foster home, licensed, approved or specified by the Indian child's tribe, whether on or off the reservation;

(iii) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) An institution for children approved by an Indian tribe operated by an Indian organization which has a program suitable to meet the child's needs.

(c) The Indian child's tribe may establish a different order of preference by resolution, and that order of preference shall be followed so long as the criteria enumerated in subsection (a)are met.

F.3. Good Cause To Modify Preferences

(a) For purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations:

(i) The request of the biological parents or the child when the child is of sufficient age.

(ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.

(iii) The unavailability of suitable families for placement after a diligent search has been complete for families meeting the preference criteria.

(b) The burden of establishing the existence of good cause not to follow the order of preferences established

in subsection (b) shall be on the party urging that the preferences not be followed.

G. Post-Trial Rights

G.1. Petition to Vacate Adoption

(a) Within two years after a final decree of adoption of any Indian child by a state court, or within any longer period of time permitted by the law of that state, a parent who executed a consent to termination of paternal rights or adoption of that child may petition the court in which the final adoption decree was entered to vacate the decree and revoke the consent on the grounds that such consent was obtained by fraud or duress.

(b) Upon the filing of such petition, the court shall give notice to all parties to the adoption proceedings and shall proceed to hold a hearing on the petition. Where the court finds that the parent's consent was obtained through fraud or duress, it must vacate the decree of adoption and order the consent revoked and order the child returned to the parent.

G.2. Adult Adoptee Rights

(a) Upon application by an Indian individual who has reached age 18 who was the subject of an adoptive placement, the court which entered the final decree must inform such individual of the tribal affiliations, if any of the individual's biological parents and provide such other information necessary to protect any rights flowing from the individual's tribal relationship.

(b) The section applies regardless of whether or not the original adoption was subject to the provisions of the Act.

(c) Where state law prohibits revelation of the identity of the biological parent, assistance of the Bureau of

Indian Affairs shall be sought where necessary to help an adoptee who is eligible for membership in a tribe establish that right without breaching the confidentiality of the record.

G.3. Notice of Change in Child's Status

(a) Whenever a final decree of adoption of an Indian child has been vacated or set aside, or the adoptive parent has voluntarily consented to the termination of his or her parental rights to the child, or whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, notice by the court or an agency authorized by the court shall be given to the child's biological parents or prior Indian custodians. Such notice shall inform the recipient of his or her right to petition for return of custody of the child.

(b) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice filed with the court. Such waiver may be revoked at any time by filing with the court a written notice of revocation, but such revocation would not affect any proceeding which occurred before the filing of the notice of revocation.

G.4. Maintenance of Records

The state shall establish a single location where all records of every foster care, preadoptive placement and adoptive placement of Indian children by courts of that state will be available within seven days of a request by an Indian child's tribe or the Secretary. The records shall contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination.

No. 05-271

Supreme Court, U.S.
FILED
SEP 30 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DEBRA F.,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Wisconsin, District I

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

E. MICHAEL MCCANN
THOMAS C. BINGER
Counsel of Record
MILWAUKEE COUNTY DISTRICT ATTORNEY'S OFFICE
821 W. State St.
Milwaukee, WI 53233
(414) 278-4665

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

If the question of whether "active efforts" were made, pursuant to 25 U.S.C. § 1912(d), to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family is submitted to the finder of fact at trial, what is the petitioner's burden of proof?[1]

[1] Debra F. frames the question as "Do the Due Process Clause of the Fourteenth Amendment and fundamental tenets of statutory construction require the State to prove beyond a reasonable doubt that "active efforts have been made to . . . prevent the breakup of the Indian family" in accordance with § 1912(D) of the Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq., in termination of parental rights proceedings involving Indian children?"

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STATEMENT OF THE CASE

Branden F. has already been adopted. He was adopted on July 7, 2005 by the only parents he has ever known, a married couple who has raised him since he was six weeks old in December, 1998. Social workers detained Branden at birth on October 20, 1998, and he never lived with Debra F.[1]

Due to inexcusable delay on the part of Debra F. and her tribe, the White Earth Band of the Chippewa Tribe, the Indian Child Welfare Act did not apply to this case until 2002. Despite ample notice and time to investigate, it was not until the eve of the filing of the termination of parental rights petition on June 25, 2002 that Debra F. and the Tribe first claimed that Branden F. was eligible for membership in the Tribe. After two years of hearings, the trial court terminated Debra F.'s parental rights, freeing Branden for adoption. The Wisconsin Court of Appeals, in an unpublished opinion, subsequently rejected all of Debra F.'s attacks on the trial court's judgment. The Wisconsin Supreme Court declined Debra F.'s Petition for Review. Now, Debra F. seeks to perpetuate a three-year legal experiment on a young boy who is her son by biology alone.

---

[1] No man was ever adjudicated as the father of Branden F. and the alleged father did not participate in the case.

ARGUMENT

I. THE WISCONSIN COURT OF APPEALS PROPERLY RULED THAT THE STATE'S BURDEN OF PROOF ON THE "ACTIVE EFFORTS" ELEMENT OF 25 U.S.C. § 1912(d) WAS CLEAR AND CONVINCING EVIDENCE

The Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq. ("ICWA"), was simply not intended for a case such as this. This is not a case in which non-Indian authorities swept in and removed an Indian child from an Indian family. No cultural bias was implicated here. In fact, according to the Tribe, Branden was not even an "Indian child" at birth. By the time the Tribe got around to conclusively determining Branden's eligibility for membership, the case had matured into the advanced stages of permanency.

Unlike the two subsections that follow it, the express language of 25 U.S.C. § 1912(d) contains no burden of proof. "[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. U.S.*, 464 U.S. 16, 22 (1983). Debra F. presumes that the omission of any burden of proof in § 1912(d) is meaningless and was a simple mistake in draftsmanship. This presumption is baseless.

By use of the phrase "shall satisfy the court," Congress may have intended the "active efforts" finding to be a preliminary finding, akin to jurisdiction or probable cause, and not an issue for the finder of fact. Certainly, if Congress meant for the "active efforts" finding to be made after a trial, it could have spelled that out explicitly. Two

jurisdictions, Oregon and Idaho, have ruled that the "active efforts" requirement is not a trial issue at all, but rather a threshold or preliminary finding a court must make. *In re Jade Charles*, 688 P.2d 1354, 1358 (Or. Ct. App. 1984), *rev. granted*, 693 P.2d 48 (1984), *rev. dismissed*, 701 P.2d 1052 (1985); *In re Matter of Baby Boy Doe*, 902 P.2d 477, 482-84 (Idaho 1995). In the latter case, the Idaho Supreme Court noted "that the word 'satisfy,' as used [in 25 U.S.C. § 1912(d)] has a distinct meaning. The definition which seems most consistent with this context is 'to persuade by argument or evidence.'" *Id.* at 482 (*citing Webster's Third New International Dictionary*, 2017 (1971)). The Idaho Court concluded that the "ordinary meaning of the word satisfy" was not "to convince 'beyond a reasonable doubt.'" *Id.*

Congress had an opportunity to insert a specific burden of proof into § 1912(d) when it amended § 1912(e):

> Subsections (e) and (f) establish evidentiary standards for foster care placement or termination of parental rights. As introduced, H.R. 12533 required a "beyond a reasonable doubt" standard for both actions. While the committee feels that the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty, it amended the bill to reduce the standard to "clear and convincing" in the case of foster care where parental rights are not terminated.

H.R. Rep. No. 1386, 95th Cong. 2nd Sess. 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7545. "By amending subsection (e) to *reduce* the standard from 'beyond a reasonable doubt' to 'clear and convincing,' Congress displayed considered precision in articulating the evidentiary burdens it was imposing." *In re Baby Doe*, 902 P.2d at

483 (emphasis in original). The implication here is that Congress expressly omitted a burden of proof in § 1912(d) because Congress did not intend for the § 1912(d) issue to be determined at trial. The legislative history of § 1912(d) supports this:

> [Section 1912(d)] provides that a party seeking foster care placement or termination of parental rights involving an Indian child must satisfy the court that active efforts have been made to provide assistance designed to prevent the breakup of Indian families. The committee is advised that most State laws require public or private agencies involved in child placements to resort to remedial measures prior to initiating placement or termination proceedings, but that these services are rarely provided. This subsection imposes a Federal requirement in that regard with respect to Indian children and families.

H.R. Rep. No. 1386, 95th Cong. 2nd Sess. 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7545.

Two other jurisdictions have ruled that the standard of proof on "active efforts" is a preponderance of the evidence. *See In re Cari B.*, 763 N.E.2d 917, 923 (Ill. App. Ct. 2002); *K.N. v. State of Alaska*, 856 P.2d 468 (Alaska 1993). The problem with a preponderance of the evidence standard is this Court's decision in *Santosky v. Kramer*, 455 U.S. 745 (1982). In *Santosky*, this Court ruled that "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State supports its allegations by at least clear and convincing evidence." *Id.* at 747-48. *Santosky* seems to eliminate any possibility that the "active efforts" burden of proof is by a preponderance of the evidence, unless the finding is merely a threshold one. While a

strong argument could be made to that effect, in this case the trial court enhanced Debra F.'s Due Process protection by submitting the "active efforts" question to the jury, which unanimously found clear and convincing evidence that the social workers[3] had made "active efforts."[4]

The clear and convincing burden of proof was proper. Several other jurisdictions have adopted that burden on "active efforts." *See, e.g., In re Annette P.*, 589 A.2d 924 (Me. 1991); *In re Michael G.*, 74 Cal. Rptr. 2d 642, 63 Cal. App. 4th 700 (Cal. App. 1998); *State ex rel. Human Servs. Dep't v. Penny J.*, 890 P.2d 389, *writ of certiorari denied*, 888 P.2d 466 (N.M. 1994); *Dvorak v. S.H.*, 624 N.W.2d 678 (N.D. 2001); *In re A.M.*, 22 P.3d 828, *rev. denied*, 34 P.3d 1232 (Wa. Ct. App. 2001). This is consistent with *Santosky* and the statutory interpretation of § 1912(d) when read in conjunction with subsections (e) and (f). On the other hand, the decisions that have required proof of "active efforts" beyond a reasonable doubt contain virtually no analysis to support such a finding.

For example, in *In the Matter of G.S.*, 59 P.3d 1063 (Mont. 2002), the Supreme Court of Montana decided that the burden of proof on "active efforts" depended on the type of proceeding. *Id.* at 1071. The Supreme Court essentially implied language from §§ 1912(e) and (f) into § 1912(d), as if the omission had no meaning. Likewise, the Minnesota Court of Appeals simply made a conclusory statement that the burden of proof for § 1912(d) must be

---

[3] The Bureau of Milwaukee Child Welfare provided services to Debra F. in this case.

[4] The right to a trial by jury in a TPR case is not required by *Santosky* and is an additional procedural protection found in Wisconsin.

the same as in § 1912(f). *In the Matter of M.S.S.*, 465 N.W.2d 412, 418 (Minn. Ct. App. 1991). The South Dakota Supreme Court makes a similarly perfunctory point in *In the Interest of S.R.*, 323 N.W.2d 885, 887 (S.D. 1992). None of these cases contain any statutory analysis of 25 U.S.C. § 1912(d). Nor do they weigh the impact of the omission of any burden of proof in that subsection against the explicit inclusion of burdens of proof in §§ 1912(e) and (f). Logic, and the better-reasoned precedent, supports the trial court's ruling that the burden of proof on "active efforts" should be clear and convincing.

II. THE UNPUBLISHED DECISION OF THE WISCONSIN COURT OF APPEALS IN THIS CASE DID NOT CREATE A CONFLICT AMONG STATE COURTS OF LAST RESORT CONCERNING A QUESTION OF FEDERAL LAW.

Supreme Court Rule 10(b) does not warrant review of this case. Although a conflict between states exists as to which burden of proof applies to § 1912(d), Wisconsin is a non-combatant. No published opinion in Wisconsin has decided the question. The decision in this case was not only unpublished but it was also rendered by the intermediate Court of Appeals, not the state court of last resort. No court may cite the Court of Appeals' ruling in this case as precedent. Further, the Wisconsin Supreme Court declined Debra F.'s petition to review the decision. While the issue in this case may eventually require resolution by the United States Supreme Court, the procedural posture here does not rise to a level necessitating review.

CONCLUSION

The State of Wisconsin respectfully requests that the United States Supreme Court deny Debra F.'s Petition for Certiorari.

Dated this 29th day of September, 2005 at Milwaukee, Wisconsin.

Respectfully submitted,

E. MICHAEL MCCANN
THOMAS C. BINGER
Counsel of Record
MILWAUKEE COUNTY DISTRICT ATTORNEY'S OFFICE
821 W. State St.
Milwaukee, WI 53233
(414) 278-4665

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No. _____

IN THE
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DEBRA F.

Petitioner,

vs.

STATE OF WISCONSIN

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Wisconsin

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL J. VRUNO, JR.
Guardian ad Litem

LEGAL AID SOCIETY
OF MILWAUKEE, INC.
GUARDIAN AD LITEM DIVISION
10201 WATERTOWN PLANK RD.
MILWAUKEE, WI 53226
(414) 257-7159

AMERICAN FINANCIAL PRINTERS • (202) 464-5500

QUESTION PRESENTED FOR REVIEW

DID THE WISCONSIN COURTS CORRECTLY HOLD THAT THE STANDARD OF PROOF FOR THE "ACTIVE EFFORTS" REQUIREMENT OF THE INDIAN CHILD WELFARE ACT IN A TERMINATION OF PARENTAL RIGHTS CASE IS CLEAR AND CONVINCING EVIDENCE WHERE CONGRESS CLEARLY OMITTED THE HIGHER CRIMINAL STANDARD OF PROOF FOR THAT SECTION OF THE STATUTE, WHILE PRESCRIBING THE HIGHER STANDARD IN ANOTHER SECTION?

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IN THE
SUPREME COURT OF THE UNITED STATES

DEBRA F.

Petitioner,

vs.

STATE OF WISCONSIN

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

INTRODUCTION

When Congress drafted the Indian Child Welfare Act, it required two separate judicial findings in the any proceeding to terminate the parental rights of an Indian parent. First it required that the state "satisfy the court that active efforts have been made" to prevent the breakup of the Indian family and that those efforts have been unsuccessful (the "active efforts" requirement of 25 U.S.C. §1912(d)). Second, it required that the state prove *beyond a reasonable doubt* that the child would suffer "serious physical or emotional damage" if the child continued in the custody of the Indian parent (the "serious damage" element of 25 U.S.C. 1912(f)).

The state trial court declined to extend the beyond a reasonable doubt standard beyond the "serious damage"

requirement, the only ICWA provision for which Congress required the law's highest burden. Citing this Court's precedent in *Santosky v. Kramer*, 455 U.S. 745 (1982), the trial court applied the "clear and convincing evidence" middle burden of proof to the active efforts requirement of ICWA.

Neither the plain language of the ICWA statute nor the basic tenets of statutory construction support Petitioner's argument that Congress intended the beyond reasonable doubt standard to apply to all ICWA termination of parental rights findings. Accordingly, the higher burden for the ICWA serious damage requirement does not require this Court to revisit *Santosky* and require the highest standard of proof for the active efforts determination. The *Santosky* Court's due process analysis under *Mathews v. Eldridge*, 424 U.S. 319 (1976), which resulted in adoption of the clear and convincing evidence constitutional standard for termination of parental rights is unaffected by ICWA's requirement of a higher burden on the serious damage factor alone. To the contrary, Congress' enactment of the Adoption and Safe Families Act (ASFA) suggests, if anything, that the state's interest in providing permanent homes for children in its care has become more critical than at the time *Santosky* was decided.

Finally, the Petitioner overstates the degree to which the lower courts have disagreed over whether to apply the *Santosky* clear and convincing evidence standard or the beyond reasonable doubt standard for ICWA active efforts determinations. Only one state's highest court has held that the beyond reasonable doubt standard should be applied and that court eschewed any analysis of the ICWA statutory language. Moreover, virtually every court that has considered the issue since ASFA was enacted has applied the *Santosky* middle standard of proof rather than the highest burden.

STATEMENT OF THE CASE

Branden F. was born on October 20, 1998 with cocaine in his system (P-App. A-2) . The Bureau of Milwaukee Child Welfare placed him in foster care shortly thereafter due to his mother's drug and alcohol problems. He has resided with his adoptive parents since he was two months of age.

In compliance with the federal Indian Child Welfare Act, the Bureau first contacted Petitioner's tribe, the White Earth Band of Minnesota Chippewa, in November, 1998 to inquire about his eligibility for membership in the tribe (P-App. A-5). The tribe denied Branden's eligibility in two separate letters (*Id.*) The tribe showed no interest in Branden until after the State filed a petition for termination of parental rights (hereinafter "TPR") in June, 2002.

Petitioner exercised her right to a jury trial on the alleged grounds for termination of her parental rights, "failure to assume parental responsibility," Wis. Stat. §48.415(6). The jury trial took place in May, 2004. During the trial, the trial court ruled that in accordance with this Court's holding in *Santosky v. Kramer*, 455 U.S. 745 (1982), the State was required to prove the "active efforts" element required by 25 U.S.C. §1912(d) by clear and convincing evidence. (P-App. A-10). The jury answered the 1912(d) verdict questions and the state TPR unfitness grounds verdict question in the affirmative (P-App. E-1, E-2). The jury also found that the state had proved beyond a reasonable doubt the "serious physical or emotional harm" verdict question required by 25 U.S.C. §1912(f) (*Id*). At the conclusion of the June 24, 2004 dispositional hearing, the trial court found that termination of Petitioner's parental rights was in Branden's best interests and granted the TPR Order (P-App. A-4).

Petitioner appealed the order terminating her parental rights to the Wisconsin Court of Appeals, citing, among other things, the trial court's use of the clear and convincing standard for the "active efforts" element of proof. In an unpublished opinion of March 22, 2005, the Wisconsin Court of Appeals rejected her challenge to the standard of proof used by the trial court in relation to 25 U.S.C. §1912(d). The Court concluded that because Congress had clearly specified the beyond a reasonable doubt standard for §1912(f), but omitted that requirement for §1912(d), the trial court correctly applied accepted rules of statutory construction in finding that Congress had not intended to apply the highest burden of proof to §1912(d) (P-App. A-10).

Petitioner requested review of the Court of Appeals decision by the Supreme Court of Wisconsin, again arguing that the trial court employed the improper standard of proof to the active efforts element of §1912(d). The Supreme Court of Wisconsin denied her Petition for Review on June 1, 2005 (P-App. B-1, B-2).

Branden was adopted by the foster parents with whom he lived since two months of age on July 7, 2005.

REASONS FOR DENYING THE PETITION

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE PLAIN LANGUAGE OF 25 U.S.C. 1912(d) DOES NOT GRANT PETITIONER THE PROCESS SHE CLAIMS IS DUE.

A. Neither the Language of §1912(d) Nor the BIA Guidelines for State Courts Suggest a Beyond a Reasonable Doubt Standard of Proof.

Nothing in the plain language of 25 U.S.C. §1912(d) suggests the highest standard of proof for the active efforts requirement in an ICWA TPR case:

> Any party seeking to effect a ... termination of parental rights to ... an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. (Emphasis added).

On the contrary, the phrase "satisfy the court" implies that Congress intended a much lower evidentiary threshold than "beyond a reasonable doubt" urged by Petitioner. Only one state court has addressed this issue by examining the plain meaning of the word "satisfy." The Idaho Supreme Court concluded: "(u)nless a contrary purpose is clearly indicated, ordinary words are given their ordinary meaning when construing a statute. (Citation omitted) We cannot say that the ordinary meaning of the word satisfy is to convince "beyond a

reasonable doubt." *In the Matter of Baby Boy Doe*, 902 P.2d 477, 482 (Ida. 1995).

As noted by Petitioner, the Bureau of Indian Affairs Guidelines for State Courts (BIA Guidelines) have been accepted as persuasive authority by this Court (Petitioner's Brief, p. 14, f.n. 1). However, the language in the BIA Guidelines also gives no support for use of the highest standard of proof in the active efforts determination:

> Any party petitioning a state court for ... termination of parental rights to an Indian child must demonstrate to the court that prior to the proceeding active efforts have been made ... (Emphasis added).

BIA Guidelines, D.2., 44 Fed. Reg. 67,592, (R-App. A-1).

Neither phrase evokes the certainty of judgment necessary for the highest standard of proof.

The active efforts requirement is important, but unlike the serious damage determination, it is not intended to be of critical evidentiary significance. According to the Commentary to the BIA Guidelines, establishing detailed procedures and criteria to measure the adequacy of rehabilitation efforts "would involve the court second-guessing the professional judgment of social service agencies. The Act does not contemplate such a role for the courts and they generally lack the expertise to make such judgments." 44 Fed. Reg. 67,592 (November 26, 1979) (R-App. A-2). If the BIA does not deem that state courts are qualified to even "second-guess" states' rehabilitation efforts, it could not recommend judgment beyond a reasonable doubt.

B. Fundamental Tenets of Statutory Construction Prevent Reading the Highest Standard of Proof Into 25 U.S.C. 1912(d).

Petitioner's policy arguments that Congress intended that active efforts should be proven beyond a reasonable double ignore the basic rule of statutory construction that "when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16 (1983). Petitioner argues that because Congress explicitly requires the proof beyond a reasonable doubt of the "serious physical of emotional damage" determination in 25 U.S.C. §1912(f), trial courts should presume that it intended the same standard of proof for the "active efforts" determination. However, as the Wisconsin Court of Appeals stated, "if Congress had wanted the higher burden of proof to apply to the active efforts determination, it certainly could have so specified" (P-App. A-10).

The Petition should be denied because Congress could have assigned the criminal burden of proof to the active efforts determination but declined. The plain language of the statute and apparent Congressional intent do not support revision of the statute.

C. A Proper Analysis of the Three-Part Test Articulated By This Court Supports an Application of the Clear and Convincing Evidence For the Active Efforts Determination.

This Court established clear and convincing evidence as the correct standard of proof for termination of parental

rights cases in its decision in *Santosky v. Kramer*, 455 U.S. 745 (1982). As noted by Petitioner's Brief, the *Santosky* Court applied the three-part due process analysis articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). However, Petitioner ignores the legitimate interests of the child in a TPR case and understates the countervailing state interests in preserving the standard of proof established by this Court.

Congress' enactment of the Adoption and Safe Families Act of 1997, Pub. L. 105-89, reflects Congress' concern for providing permanent homes for foster children as soon as possible after reunification efforts fail. Among other things, the Act requires the states, under threat of financial penalty, file for termination of parental rights whenever a child has been placed out of the parental home for fifteen of the preceding twenty-two months, absent certain exceptions.[1] 42 U.S.C. §675(5)(E). At the time this Court decided *Santosky*, this federal concern for permanence for foster children was not so clearly part of the equation. When Petitioner argues that in an ICWA case, the interests of a parent are even more commanding than in other TPR cases, she ignores the heightened federal interests of children who have spent unreasonable time in the impermanence of foster care.

The strict federal time limits imposed upon states for filing TPR cases has also altered the equation for analyzing the state's interest in preserving the middle burden of proof established by *Santosky*. With the enactment of ASFA, permanence and stability for children is now also a compelling state interest. Raising the standard-of-proof bar would hamper

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[1] None of the exceptions (child placed with a relative, termination of parental rights not in child's best interests, reasonable efforts not made to reunify family; 42 U.S.C. 675(5)(E)(i)(ii)(iii)) applied in this case.

the legitimate government interest in seeking permanent homes for children languishing in foster care. To ascribe to the active efforts determination the highest burden of proof could also impose a serious financial burden upon government in the form of continued foster care payments in cases where the high standard of proof discourages TPR filings or hinders the prosecution of meritorious TPR petitions. Petitioner errs when she claims that the State can articulate no greater interest in preserving the standard of proof this Court established in *Santosky*.

Petitioner's attempt to apply more stringent due process scrutiny to the standard of proof that this Court undertook in *Santosky* is ill-conceived. Absent any declaration of intent by Congress to impose the highest standard of proof to the active efforts requirement, this Court need not revisit *Santosky* and the Wisconsin courts application of its holding.

II. THE CLEAR TREND IN STATE COURT DECISIONS IS TO ASCRIBE THE MIDDLE BURDEN OF PROOF TO THE "ACTIVE EFFORTS" REQUIREMENT.

Contrary to Petitioner's suggestion, there is no significant current conflict among state courts regarding the standard of proof for the active efforts determination. The South Dakota Supreme Court is the only state court of last resort reviewing a TPR case that held that the active efforts requirement must be proved beyond a reasonable doubt. *In the Interest of S.R.*, 323 N.W.2d 885 (S.D. 1982).[2] The other state

[2] The other state Supreme Court case cited by Petitioner, *In the Matter of G.S. and S.S.*, 59 P.3d 1063 (Mt. 2002), is not a TPR case; thus, the language in the opinion is dicta with regard to the standard of proof in TPR cases.

Supreme Courts that have faced this issue in a TPR case have all found the appropriate burden of proof to be clear and convincing evidence or less. *See In re Annette P.*, 589 A.2d 924 (Me. 1991), *K.N. v. Alaska*, 856 P.2d 468 (Alaska 1993), *In the Matter of Baby Boy Doe*, 902 P.2d 477, 482 (Ida. 1995), and *In re Interest of M.S.*, 624 N.W.2d 678 (N.D. 2001). The Alaska Supreme Court relied upon an analysis of legislative history to reject the criminal standard of proof, and then made note of the absence of statutory analysis on by the courts that supported this burden of proof.[3] *K.N. v. Alaska*, 856 P.2d at 476.

Furthermore, the better reasoned and more recent lower state court decisions have also rejected the highest burden of proof for the active efforts determination. *See In re Michael G.*, 63 Cal. App. 4th 700, 74 Cal. Rptr. 2d 642, 648 (Cal. Ct. App. 1992),[4] *In re Dependency of A.M.*, 22 P.2d 828, 833-34 (Wash. Ct. App. 2001), *In re Cari B.*, 763 N.E.2d 917 (Ill. App. 2002).

Significantly, all of the lower state court decisions cited by Petitioner pre-date the federal Adoption and Safe Families Act of 1997, Pub. L. No. 105-89. *See In the Matter of M.S.S.*, 465 N.W.2d 412, 418 (Minn. Ct. App. 1991), *In re L.N.W.*, 457

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[3] The totality of the South Dakota Supreme Court's analysis was: "we assume that the same burden required to prove serious emotional or physical damage under §1912(f), beyond a reasonable doubt, would also be required to prove active efforts."

[4] This California court was one of the few to reference a rule of statutory construction in its analysis: "when the Legislature has employed a term in one place and has excluded it in another, it should not be implied where excluded. (Citations omitted) If Congress meant for the 'active efforts' determination to be supported by evidence beyond a reasonable doubt, it coulod have easily said so." 74 Cal. Rptr. at 648.

N.W.2d 17, 19 (Iowa Ct. App. 1990), *In the Matter of Kreft*, 148 Mich. App. 682, 693, 384 N.W.2d 843, 849 (1986).[5] Addressing the national problem of children languishing years in foster care without permanent homes, the Act, among other things, requires states to seek termination of parental rights for children who have been in foster care for fifteen of the previous twenty-two months, unless certain exceptions apply. 42 U.S.C. 675(5)(E) (2003). In light of this federal policy to ensure timely terminations of parental rights and adoptions for children, it is highly likely that were this standard of proof issue to arise again in jurisdictions that have not addressed it in fourteen years or more, those jurisdictions would follow the national trend to the middle burden of proof.

Review of this issue by the United States Supreme Court is not necessary because the natural development of the law in the various jurisdictions around the country is highly likely to continue the trend toward uniformity among the states on the issue presented by the Petition.

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[5] This writer has found only one lower state court decision rendered after the enactment of the Adoption and Safe Families Act that support the highest burden of proof: *In the Interest of R.L.*, 961 P.2d 606, 609 (Colo. App. 1998), noting that (at that time) most courts had mandated the highest burden of proof.

CONCLUSION

Based upon the foregoing, the Guardian ad Litem for Branden respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted this 30th day of September, 2005.

MICHAEL J. VRUNO, JR.
Gu ırdian ad Litem

LEGAL AID SOCIETY
OF MILWAUKEE, INC.
Guardian ad Litem Division
10201 Watertown Plank Road
Milwaukee, WI 53226

EXCERPT FROM *RECOMMENDED GUIDELINES FOR STATE COURTS: INDIAN CHILD CUSTODY PROCEEDINGS*

44 Fed. Reg. 67,592:

D.2 Efforts To Alleviate Need To Remove Child From Parents or Indian Custodians

Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to the commencement of the proceeding active efforts have been made to alleviate the need to remove the Indian child from his or her parents or Indian custodians. These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers.

D.2 Commentary

This section elaborates on the meaning of "breakup of the Indian family" as used in the Act. "Family breakup" is sometimes used as a synonym for divorce. In the context of this statute, however, it is clear that Congress meant a situation in which the family is unable or unwilling to raise the child in a manner that is not likely to endanger the child's emotional or physical health.

This section also recommends that the petitioner take into account the culture of the Indian child's tribe and use the resources of the child's extended family and tribe in attempting to help the family function successfully as a home

for the child. The term "individual Indian care givers" refers to medicine men and other individual tribal members who may have developed special skills that can be used to help the child's family succeed.

One commenter recommended that detailed procedures and criteria be established in order to determine whether family support efforts had been adequate. Establishing such procedures and requirements would involve the court in second-guessing the professional judgment of social service agencies. The Act does not contemplate such a role for the courts and they generally lack the expertise to make such judgments.